# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 784

CHARLES N. BEVAN, APPELLANT,

*vs.*

DAVID M KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 16, 1933

(37,481)

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] Return of clerk omitted in printing.

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[fol. 2] **IN SUPREME COURT OF OHIO**

No. 23652

Ex Parte C. N. Bevan, Plaintiff-in-error

Petition for Appeal from the Supreme Court of Ohio to the Supreme Court of the United States—Filed Feb. 10, 1933

To the Chief Justice of the Supreme Court of Ohio:

The petitioner, Charles N. Bevan, appearing herein as C. N. Bevan, is the plaintiff-in-error in the above entitled case.

On the fourteenth day of June, 1932, petitioner commenced his suit in the Court of Appeals for Lucas County, Ohio, seeking his discharge from imprisonment by the Sheriff of Lucas County, Ohio, under an order of commitment issued by one William Purcell, a notary public, for an alleged contempt of said notary occurring during an attempt to take depositions before said notary public in a certain action, entitled "Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants", numbered 131925 on the docket of the Common Pleas Court of Lucas County, Ohio. Final judgment was rendered against the petitioner by said Court of Appeals and by said judgment he was remanded to the custody of said Sheriff, the respondent herein.

After said judgment the petitioner filed his petition-in-error in this cause in the Supreme Court of Ohio, seeking a reversal of the said judgment of the said Court of Appeals; and, after hearing, the Supreme Court of Ohio, on January 25th, 1933, made and entered its final decision and judgment herein affirming the judgment of the said Court of Appeals.

The Supreme Court of Ohio is the highest court of the State of Ohio in which a decision could be had in said suit, and its said judgment is final.

In this suit there is drawn in question the validity of certain statutes of the State of Ohio, viz., Ohio General Code Sections 11510, 11511 and 11512, on the ground that they and each of them, and the operation of said sections and each of them, as applied to the facts in this case, deprive [fol. 3] the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

There is also drawn in question in this suit the validity of certain other statutes of the State of Ohio, viz., Ohio General Code Sections 11497, 11503 and 11514, on the ground that they and each of them and the operation of said sections and each of them, as applied to the facts in this case, likewise deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

Manifest error has occurred, to this petitioner's prejudice, as shown herein and in the assignment of errors filed herewith, in which are more fully set out the errors complained of.

In accordance with the Rules of the Supreme Court of the United States (Rule 46, par. 2) the petitioner respectfully shows that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54; 28 U. S. C. A. Sec. 861 (a)) was passed, viz., under 28 U. S. C. A. Section 344, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of Ohio to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of Ohio may be examined and reversed and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner, desiring the appeal to be a supersedeas, also [fol. 4] prays that an order be made fixing the amount of security which petitioner as appellant, shall give and furnish upon said appeal, and that upon the giving of said security, all further proceedings in this court be suspended and stayed, and the supersedeas granted by this court to the judgment of the Court of Appeals of Lucas County, Ohio, remain in force until the determination of said appeal by the Supreme Court of the United States.

George D. Welles, Crary Davis, Attorneys for Petitioner. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fol. 5] [File endorsement omitted.]

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[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 10, 1933

Plaintiff in error, Charles N. Bevan, who brought this suit under the name of C. N. Bevan and who will be hereinafter referred to as the appellant, in connection with and as a part of his petition for an appeal herein to the Supreme Court of the United States, assigns the following errors in the record and proceedings in this case upon which he will rely upon said appeal:

First. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals of Lucas County, Ohio, and in refusing to reverse the judgment of said court.

Second. The Supreme Court of Ohio erred in not finding and adjudging that this appellant was wrongfully and illegally imprisoned without due process of law, in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in not ordering appellant discharged.

Third. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them as applied to

the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

[fol. 7] Fourth. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty or property, without due process of law".

Fifth. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was committed by a notary public under said Sections 11510, 11511 and 11512 and erred in not holding that said Sections 11510, 11511 and 11512 construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property, without due process of law".

Sixth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514 and each of them are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the Four-[fol. 8] teenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property, without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

Seventh. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall

"deprive any person of life, liberty or property, without due process of law", in that no provision is made by said [fol. 9] sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, Ohio, and in that in this case the notary public did not in fact give appellant any notice of any hearing, or afford to appellant an opportunity for him to be present at a hearing and defend in person or by counsel, before finding and adjudging appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, under which order appellant was wrongfully arrested and confined by the defendant in error (appellee).

Eighth. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and the attempted adjudication that appellant was in contempt, and the issuing of an order of commitment, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Con- [fol. 10] stitution of the United States and were null and

void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property, without due process of law".

Ninth. The Supreme Court of Ohio erred in not holding that appellant has, without due process of law and in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, been unlawfully deprived of his liberty in actual fact by reason of an order given by one of counsel for a party in a civil cause in the Court of Common Pleas of Lucas County, Ohio, to a Notary Public and carried into effect by such notary public, who had been employed by such counsel for the purpose of enabling such counsel to engage in an unreasonable search and seizure of books, papers and records in appellant's possession and that by express direction of such counsel said unlawful commitment was made by said notary public without judicial hearing of any kind, and that appellant was in fact deprived of his liberty by the acts and orders of such counsel, pretending to comply with the form of law through the use of the signature of said notary public on the order of commitment.

Tenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment of the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be [fol. 11] produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books, papers or documents.

Eleventh. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503,

11510, 11511, and 11512, and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they attemp to confer upon notaries public who, under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them occurring in their presence, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

Twelfth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them as applied to the facts in this case do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the commitment and imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt for failing or refusing to give the evidence demanded and disqualified from ordering this appellant committed.

[fol. 12] Thirteenth. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's commitment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify

and to produce the books, papers and documents referred to in the order of commitment issued by said notary for this appellant and in finding and adjudging this appellant guilty of contempt and issuing said order of commitment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of commitment, so that said notary public's acts in so adjudging and bringing about the appellant's commitment and detention were a denial of due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law".

Fourteenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to [fol. 13] the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law."

Fifteenth. The Supreme Court of Ohio erred in holding that the Court of Appeals of Lucas County, Ohio, likewise did not err in holding as stated in each of the foregoing

assignments of error numbered Second to Fourteenth inclusive.

Wherefore the petitioner prays that the said judgment of the Supreme Court of Ohio, dated January 25th, 1933, in the above entitled cause be reversed and that judgment be rendered in his favor.

Dated February 10th, 1933.

George D. Welles, Crary Davis, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fols. 14-22] [File endorsement omitted.]

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[fol. 23] IN SUPREME COURT OF OHIO

No. 23652

Ex Parte C. N. BEVAN, Plaintiff-in-error

ORDER ALLOWING APPEAL—Filed Feb. 10, 1933

The plaintiff-in-error and appellant, Charles N. Bevan (appearing herein as C. N. Bevan) having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Ohio on the 25th day of January, 1933, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and his statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment of the Supreme Court of Ohio, all pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judg-

ment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

It is further ordered that said appellant shall give good and sufficient security in the sum of $1,000.00, that said appellant shall prosecute said appeal to effect and if said appellant fail to make his plea good, he shall answer all damages and costs; that upon the appellant's giving said security, the appeal shall operate as a supersedeas and stay [fol. 24] of execution and other proceedings under said judgment of the Supreme Court of Ohio pending such appeal and appellant shall be enlarged pending such appeal.

Dated February 10, 1933.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio. —— ——, Associate Justice of the Supreme Court of the United States.

[fol. 25] [File endorsement omitted.]

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[fols. 26 & 27] Citation, in usual form, showing service on David M. Krieger et al., filed February 16, 1933, omitted in printing.

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[fol. 28] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL—Filed March 3, 1933

It is hereby stipulated by and between counsel for the appellant, C. N. Bevan, and counsel for the appellee, David M. Krieger, as Sheriff of Lucas County, Ohio, that the Clerk of the Supreme Court of Ohio shall make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and shall include in such transcript of record the following and no other papers and exhibits:

1. Title page and caption;

2. Petition-in-error filed in the Supreme Court of Ohio on June 24, 1932, and Entry of Appearance by defendant-in-

error, filed with the Clerk of the Supreme Court of Ohio, on June 25, 1932;

3. Transcript of Docket and Journal Entries in Court of Appeals, Lucas County, Ohio, filed with the Clerk of the Supreme Court of Ohio on July 23, 1932;

4. The pleading which bears title "Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County, Ohio, on June 14, 1932, (which pleading appellant claims to be a petition for Writ of Habeas Corpus and appellee claims to be an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibits attached to said petition, said Exhibits being the Subpœna Duces Tecum which was served upon this appellant, C. N. Bevan, and the order of commitment of this appellant, C. N. Bevan;

5. The pleading bearing the title "Amendment to Petition for Writ of Habeas Corpus", filed in Court of Appeals, [fol. 29] Lucas County, Ohio, on June 15, 1932, (which pleading appellant claims to be an amendment to his Petition for Writ of Habeas Corpus and appellee claims to be an Amendment to an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibit A, attached thereto, which Exhibit A is the petition filed in the Court of Common Pleas, Lucas County, Ohio, in case entitled "Clara Sieleken-Schwarz, New York, plaintiff, v. The Woolson Spice Company, et al., defendants."

6. Writ bearing the title "Writ of Habeas Corpus" filed with the Clerk of said Court of Appeals, Lucas County, Ohio, on June 15, 1932, (which writ appellant claims to be a Writ of Habeas Corpus and appellee claims to be a writ issued upon an Application for Discharge from Imprisonment under O. G. C. Sec. 11514), together with the Sheriff's Return thereto; the Commitment papers attached to said return to be shown only by incorporating, by reference, the "Order of Commitment" attached as an Exhibit to the Pleading (referred to in paragraph numbered 4 of this Stipulation) bearing the title of "Petition for Writ of Habeas Corpus"; the Sheriff's return to said Order of Commitment to be here included in full;

7. Recognizance, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 17, 1932;

8. Motion for New Trial, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 22, 1932;

9. Bill of Exceptions, allowed by said Court of Appeals on June 23, 1932, and filed with the Clerk of the Supreme Court of Ohio on July 23, 1932; together with plaintiff's Exhibits 1, 2, 3, 3A, 3B, 3C, 4 and 6 to 11, inclusive, and defendant's Exhibits 1 to 4, inclusive. Of the foregoing exhibits, the following to be shown only by reference to the same papers in preceding pages of transcript, viz: Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants) by incorporating, by reference, the same paper which is attached as Exhibit A to the pleading (referred to in paragraph numbered 5 of [fol. 30] this stipulation) bearing the title "Amendment to Petition for Writ of Habeas Corpus"; Plaintiff's Exhibit 3A (order of commitment of C. N. Bevan); and Plaintiff's Exhibit 7 (subpœna duces tecum on C. N. Bevan) by incorporating, by reference, the same papers which are attached as Exhibits to the pleading (referred to in paragraph numbered 4 of this stipulation) bearing the title "Petition for Writ of Habeas Corpus"; of the foregoing Exhibits the following to be indicated only by title as follows, viz: Plaintiff's Exhibit 3B (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 3C (Notary's Writ of Attachment of John W. Koehrman); Plaintiff's Exhibit 8 (Subpœna Duces Tecum served upon John W. Koehrman); Plaintiff's Exhibit 9 (Subpœna served upon Robert A. Stranahan); Plaintiff's Exhibit 10 (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 11 (Opinion of the Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas, 92 N. Y. 40); of the foregoing, Plaintiff's Exhibit 4 and Defendants' Exhibits 2 and 3 shall be abbreviated in accordance with the typewritten copies thereof submitted to you by counsel;

10. Opinion of the Court of Appeals of Lucas County, Ohio, in this cause;

11. Journal Entry filed in Supreme Court of Ohio on August 24, 1932, substituting Gilson D. Light, as Sheriff of Lucas County, Ohio, as defendant-in-error;

12. Motion for Stay of Execution and Advancement of Cause, filed in Supreme Court of Ohio, on October 15, 1932, and notice of hearing;

13. Order of Supreme Court of Ohio, entered on or about October 26, 1932, granting stay of execution;

14. Supersedeas bond filed in Supreme Court of Ohio on November 25, 1932;

15. Judgment of the Supreme Court of Ohio filed on January 25, 1932;

16. Opinion of the Supreme Court of Ohio in this cause;

[fol. 31] 17. Order of Supreme Court of Ohio substituting David M. Krieger as Sheriff of Lucas County, Ohio, as defendant-in-error nunc pro tunc, filed February 10, 1933;

18. Appellant's petition for appeal, filed herein on February 10, 1933;

19. Appellant's assignment of errors, filed herein on February 10, 1933;

20. Appellant's statement as to the basis on which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the said jndgment of the Supreme Court of Ohio, filed herein on February 10, 1933;

21. Order allowing appeal and supersedeas, filed herein on February 10, 1933;

22. Appeal and supersedeas bond approved and filed herein on February 17th, 1933;

23. Statement to respondent-appellee (defendant-in-error in the Supreme Court of Ohio) re Paragraph 3, Rule 12, of the Supreme Court of the United States, and acknowledgment of service thereof, filed herein on February 10, 1933;

24. Citation upon appeal and proof of service, filed herein on February 16, 1933;

25. Stipulation as to Transcript of Record on Appeal;

26. Appellee's Statement Making Against the Jurisdiction Asserted by the Appellant, filed herein on February 24, 1933;

27. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 22nd day of March, 1933, pursuant to the order allowing said appeal.

[fol. 32] It is further stipulated by and between the parties that the foregoing items constitute all portions of the record necessary for a determination of the questions raised on this

appeal and that no portion of the record omitted is necessary or material for a determination of such questions.

Dated March 2, 1933.

Geo. D. Welles, Crary Davis, Attorneys for Appellant. Stuart S. Wall, H. S. Bugbee, Thomas J. Lynch, of Counsel. Baker, Hostetler, Sidlo, & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Appellee. Newton D. Baker, Harold W. Fraser, Raymond T. Jackson, John C. Morley, of Counsel.

[fols. 33-60] [File endorsement omitted.]

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[fols. 61 & 62] Supersedeas bond on appeal for $1,000, approved and filed February 17, 1933, omitted in printing.

[fol. 63] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed June 24, 1932

C. N. Bevan, plaintiff-in-error (hereinafter referred to as the petitioner) says that at the May Term, 1932, of the Court of Appeals of Lucas County, Ohio, on June —, 1932, in an action for a writ of habeas corpus which originated and was therein pending, being Cause No. 2691, entitled "Ex parte, C. N. Bevan", and in which plaintiff-in-error was petitioner and Joseph Zimmerman, as Sheriff of Lucas County, Ohio, was respondent, a judgment was rendered against the petitioner.

Said case originated in said Court of Appeals and involved questions arising under the Constitution of the United States and the Constitution of Ohio.

A transcript of the docket and journal entries and the original papers in said court are filed herewith.

There is substantial error in said record, proceedings and judgment, to the manifest prejudice of petitioner, in the following and other respects:

(1) Said Court of Appeals erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) Said Court of Appeals erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of said Court of Appeals are contrary to law.

(4) The finding, decision and judgment of said Court of Appeals are not sustained by sufficient evidence.

(5) The finding, decision and judgment of said Court of Appeals are erroneous, in that there is no evidence to sustain them.

[fol. 64] (6) Said Court of Appeals erred in not finding and adjudging that the order of commitment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no evidence attempted to be taken by said depositions, no questions asked of the petitioner, and no books, papers or documents which it was attempted to require him to produce could or would be relevant or material to any issue whatever under said alleged petition or in said alleged action, and that therefore the action of the notary public in ordering petitioner to answer any questions or to produce any books, papers or documents, and the action of the notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(8) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action, or to cause the taking of any depositions at all therein, or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that by reason thereof the action of said notary public in [fol. 65] ordering petitioner to answer any questions or to produce any books, papers or documents, and the action of the notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(9) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio, and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety".

(10) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of

security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated".

(11) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of [fol. 66] such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections and each of them as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power upon notaries public.

(13) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) Said Court of Appeals erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to attempt to force or require petitioner to answer any questions or produce any books, papers or documents upon the taking of said depositions or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of commitment against this petitioner.

(15) Said Court of Appeals erred in not finding and adjudging that said notary public in attempting to adjudge that any questions propounded to petitioner and any books, papers or documents ordered to be produced were material or relevant and in attempting to adjudge petitioner in contempt and issuing a commitment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio and that all of said acts of [fol. 67] said notary were null and void.

(16) Said Court of Appeals erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512, General Code of Ohio, and attempting to adjudicate that the questions asked of this petitioner which are referred to in the order of commitment issued and made by said notary, and the books, papers and documents which are also therein referred to, are material or relevant to any issue or issues in the case in which it was attempted to take said depositions, and attempting to adjudge the petitioner guilty of contempt and issuing said order of commitment and bringing about the arrest and detention of this petitioner under said order of commitment, was disqualified on account of his personal pecuniary interest in the taking of said depositions, so to adjudge and act and to commit or cause this petitioner to be committed, by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, such alleged judgment and order of commitment being made at the request of said plaintiff, and that his employment was upon such terms that its extent and continuance and his continued compensation were contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and by such order of commitment, and that therefore said notary's acts in so adjudging and bringing about the petitioner's conviction and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and were null and void.

(17) Said Court of Appeals erred in not finding and adjudging that the attempted adjudication by the notary that any questions propounded to petitioner and any papers, books or documents ordered to be produced by him,

are material to any issue in the case in which it was attempted to take said depositions, and the attempted adjudication that petitioner was in contempt, and the issuing of an order of commitment, all in the absence of the petitioner and without notice to him or to his counsel, and [fol. 68] without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I, and Section 1 of Article IV of the Ohio Constitution and each of said sections, and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States, and were null and void.

(18) Said Court of Appeals erred in not finding that the purported subpoena duces tecum issued by said notary was illegal and void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

(19) Said Court of Appeals erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions, was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpoena, require any questions to be answered or books, papers or documents to be produced, for the reason that no service of summons had been made on one of the defendants in said action, viz., Marion M. Miller, nor had any service been made on the defendant Irving Trust Company, in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(20) Said Court of Appeals erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) Said Court of Appeals erred in other respects apparent on the face of the record.

(22) Said Court of Appeals erred in overruling peti-
[fol. 69] tioner's motion for a new trial.

Wherefore petitioner prays that said judgment in the Court of Appeals be reversed and that he be restored to all things lost thereby.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

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[fol. 70] IN SUPREME COURT OF OHIO

[Title omitted]

ENTRY OF APPEARANCE—Filed June 25, 1932

The undersigned defendant-in-error and respondent waives the issuance and service of summons in error and enters his appearance herein.

Joseph Zimmerman, as Sheriff of Lucas County, Ohio. Fraser, Hiett, Wall & Effler, Counsel *for* Record for the Respondent in Court of Appeals.

6/24/32.

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[fol. 71] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed August 24, 1932

Upon suggestion by counsel for the petitioner, and it appearing to the court, that during the pendency of these proceedings-in-error the respondent and defendant-in-error, Joseph Zimmerman, has ceased to be Sheriff of Lucas County, Ohio, and that Gilson D. Light has succeeded said Zimmerman in said office and is now the Sheriff of Lucas County, Ohio, and with the consent of all parties, including said Gilson D. Light,

It is Ordered and Adjudged:

That said Gilson D. Light, as Sheriff of Lucas County, Ohio, is substituted as respondent and defendant-in-error herein in place of said Joseph Zimmerman, and that these proceedings-in-error proceed under their original title.

Approved.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner-Plaintiff-in-error. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Respondent-Defendant-in-error.

O. K. Gilson D. Light.

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[fol. 72] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE —Filed October 15, 1932

Now comes plaintiff-in-error, C. N. Bevan, and moves the court for an order staying execution of the final judgment of the Court of Appeals of Lucas County, Ohio, to reverse which this proceeding-in-error is being prosecuted, until this proceeding-in-error shall have been heard and decided by this court, and to fix the terms of such stay of execution.

Plaintiff-in-error further moves the court that, in the event his motion for a stay of execution be not granted, this cause be advanced for hearing and decision by this court on a date prior to the 25th day of October, 1932.

The foregoing motion for stay of execution is made upon the grounds that the present proceeding, which is in habeas corpus, presents substantial and important questions for determination,

(a) As to the construction of Sections 11510, 11511 and 11512, General Code, and their constitutionality both in respect to the Constitution of the State of Ohio and the Fourteenth Amendment to the Constitution of the United States;

(b) As to the disqualification of the Notary Public to issue the orders of commitment and attachment;

(c) As to whether any evidence is or could be relevant or material, or the giving of it enforced at the instance of the plaintiff in an action which the plaintiff has no right or capacity to maintain and in which her petition states no cause of action;

(d) As to whether the plaintiff in said action, in the Common Pleas Court of Lucas County, Ohio, has any right or capacity to maintain said action and whether her petition states any cause of action, which questions are raised in said Common Pleas Court by a demurrer filed by one of [fols. 73–76] the defendants in said action, which demurrer is pending and set for hearing on October 27, 1932;

(e) Other and related questions, shown by the brief of plaintiff-in-error, which questions are of general interest and importance; and upon the further grounds appearing in the attached affidavit of plaintiff-in-error in support hereof.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

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[fol. 77] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER GRANTING MOTION BY PLAINTIFF IN ERROR FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Oct. 26, 1932

It is ordered by the Court that this motion be, and the same hereby is, Allowed.

Journal 33, Page 29.

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[fol. 78] Supersedeas bond on stay for $100, approved and filed November 25, 1932, omitted in printing.

[fol. 79] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY, A. D. 1933

No. 23652

Ex Parte C. N. BEVAN

Error to the Court of Appeals of Lucas County

JUDGMENT—Jan. 25, 1933

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same hereby is, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended taxed at $—.

Ordered that a special mandate be sent to the Court of Appeals of Lucas County, to carry this judgment into Execution.

Journal 33, Page 90.

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[fol. 80] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed February 10, 1933

Upon the suggestion by counsel for the plaintiff-in-error, and it appearing to the Court, that during the pendency of these proceedings in error, viz., on January 1, 1933, defendant-in-error, Gilson D. Light, ceased to be Sheriff of Lucas County, Ohio, and that David M. Krieger has succeeded said Light in said office and is now Sheriff of Lucas County, Ohio,

It is Ordered and Adjudged:

That said David M. Krieger, as Sheriff of Lucas County, Ohio, is substituted nunc pro tunc as defendant-in-error herein in place of said Gilson D. Light.

Carl V. Weygandt, C. J.

[fol. 81] IN SUPREME COURT OF OHIO

Nos. 23652, 23653 and 23654

Decided January 25, 1933

Ex Parte BEVAN

Ex Parte KOEHRMAN

Ex Parte STRANAHAN

Error to the Court of Appeals of Lucas County

Evidence—Depositions—Judicial power not exercised by notary public committing witness for contempt—Constitutional law—Sections 11510, 11511 and 11512, General Code—Due process of law—Committed witness afforded statutory remedy—Section 11514, General Code—Relevancy or competency of testimony and privilege preserved in trial court—Right to cross-examine adverse party vests when summons served—Sections 11497 and 11526, General Code—Cross-examination authorized, although codefendant not served—Codefendant may be served, how—Section 11299, General Code—Infirmity of petition or action not ground for refusal to respond—Notary public not disqualified for interest in taking depositions—Subpœna duces tecum not unreasonable search and seizure—Entire corporate correspondence file, records and documents ordered produced—Collection of assets of corporation—Heir or legatee may maintain action, upon refusal of personal representative.

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

[fol. 82] 5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpœnas duces tecum, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

OPINION

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases.

An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error C. N. Bevan was held under a commitment issued by a notary [fol. 83] public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpœna duces tecum, in the course of the taking of his deposition in the suit of Clara Sielcken-Schwarz v. The Woolson Spice Company et al., pending in the common pleas court of Lucas county. The plaintiffs in error John W. Koehrman and Robert A. Stranahan had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpœnas personally served upon them.

The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error John W. Koehrmann and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrmann and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in as- [fol. 84] sociation with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the common pleas defendants, and subpœnas duces tecum were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the common pleas plaintiff

were served with a motion to quash the notice to take depositions and the subpœnas duces tecum, and to enjoin the [fol. 85] taking of depositions. This motion came on for hearing before the common pleas court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court, an agreement was reached between counsel for the common pleas plaintiff and chief counsel for the common pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the common pleas defendants, subpœnas duces tecum upon the plaintiffs in error Bevan and Koehrman, and ordinary subpœnas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a. m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpœna. The witnesses Koehrman and Stranahan disregarded their subpœnas and failed to appear. On the failure of three of the witnesses summoned to appear, and the failure of the witness Bevan, to make any compliance with his subpœna duces tecum, the notary adjourned the hearing until 2 p. m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpœna. Prior to this adjourned time for the taking of these depositions a supplemental motion to quash the new notices and subpœnas, and to enjoin the taking of depositions in the common pleas suit was filed in the common pleas court. At 2 p. m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only [fol. 86] reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpœna duces tecum. Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he

again refused to produce any of the books, records or documents described in his subpœna duces tecum.

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in obedience to their subpœnas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a. m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of habeas corpus were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and common [fol. 87] pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the Court of Appeals of Lucas county on June 15th and 16th, and after

hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the common pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpœnas duces tecum called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpœnas.

On June 22d the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on [fol. 88] June 29th these applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson and Messrs. Fraser, Hiett, Wall & Effler for defendant in error.

STEPHENSON, J.:

These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpœna, and Bevan and Koehrman were served with subpœnas duces tecum.

No complaint is made as to the service of the subpœnas. It is contended that the subpœnas duces tecum "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case, it is significant that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpœnas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpœna duces tecum, giving as his reason [fol. 89] therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of habeas corpus, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. Bevan v. Light, Sheriff (C. C. A.), 61 F. (2d) 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for

taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the Governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to [fol. 90] perform the duties of the office, or ascertain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine," and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist

that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that [fol. 91] a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpœna or for refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. [fol. 92] Notices are regularly served to take depositions of the officers of an adversary corporation. Subpœnas are regularly served. One officer appears in obedience to his

subpœna, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of competent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpœnas duces tecum did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpœnas as unreasonably com-[fol. 93] prehensive, or that they constitute unlawful search and seizure.

Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals

which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N. S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpoenas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing [fol. 94] relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpœna, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: De Camp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C. J., and Kinkade, J., not participating.

[fol. 95] Reporter's certificate to foregoing paper omitted in printing.

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[fol. 96] In Court of Appeals of Lucas County

Docket Entries—Filed in Supreme Court of Ohio July 23, 1932

Court of Appeals Appearance Docket No. 6, Page 191.
C. A. No. 2691

Ex Parte C. N. Bevan

Marshall, Melhorn, Marlar & Martin; Tracy, Chapman & Welles.

1932.

June 14. Petition for Writ of Habeas Corpus filed.

" 14. Writ of Habeas Corpus granted. Bond fixed at $100.00. Jour. 7-276.

June 14. Præcipe filed. Writ of Habeas issued and delivered Sheriff.

" 14. Præcipe filed, Subpœna for 1 witness issued behalf Petitioner.

" 14. Præcipe filed, Subpœna for 1 witness issued behalf Petitioner.

" 14. Præcipe filed, Subpœna for 1 witness issued behalf Petitioner.

June 15. Writ of Habeas Corpus filed endorsed as follows, viz: Received this writ June 14, 1932 at 10:45 a. m. and pursuant to its command I do now

have this 15th day of June, 1932 at 9:30 a. m. the body of C. N. Bevan before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said C. N. Bevan in custody arises from and is because of a writ and commitment papers issued and delieverd to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by Rolland Staggemeier, Deputy. .91.

June 15. Amendment to Petition for Writ of Habeas Corpus filed.
" 17. Recognizance filed.
" 22. Petition of Petitioner dismissed. C. N. Bevan remanded to custody of Joseph Zimmerman, Sheriff. Petitioner to pay costs. Exceptions. Jour. 7-285.
June 22. Motion for New Trial filed.
" 22. Above motion overruled. Petitioner excepts and given leave to file Bill of Exceptions. Jour. 7-286.
" 23. Bill of Exceptions of Petitioner filed.
" 23. Time waived; Bill of Exceptions presented to the Court of Appeals.
June 23. Bill of Exceptions returned by Court of Appeals.
June 27. Motion to stay execution of Judgment & order filed.
" 29. Above motion denied. Petitioner excepts. Jour. 7-292.

[fol. 97] Clerk's certificate to foregoing paper omitted in printing.

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[fol. 98] Court of Appeals of Lucas County, Ohio

Journal Entries

At a term of the above named court begun and held before the Hon. Harry W. Lloyd, Hon. Silas S. Richards,

Hon. Roy H. Williams, presiding judges, on the 16th day of May, A. D. 1932, among other proceedings had by and before said Court on the 14th day of June, A. D. 1932, being the 25th day of said term, as appears by its Journal of that day, were the following, viz.:

C. A. No. 2691

Ex Parte C. N. Bevan

On the application of C. N. Bevan, upon his filing the petition herein, a writ of habeas corpus is hereby granted as prayed for in said petition, returnable at 9:30 a. m., Wednesday June 15, 1932. Bond is fixed in the sum of $100.00 personal cognizance.

Court of Appeals, by Harry W. Lloyd, Presiding Judge.

In Court of Appeals of Lucas County

C. A. No. 2691

Ex Parte C. N. Bevan

Judgment—June 22, 1932

Now came the Respondent herein, Joseph Zimmerman, Sheriff of the County of Lucas and State of Ohio, and made return of the writ of habeas corpus heretofore issued in this case, and also brought the body of the said C. N. Bevan, petitioner herein.

Whereupon, the court having heard and considered the evidence offered by the petitioner and the respondent, the arguments of counsel and being fully advised in the premises, finds that the said C. N. Bevan is lawfully detained and imprisoned by the said Joseph Zimmerman, Sheriff of Lucas County, Ohio.

It is, therefore, ordered, adjudged and decreed that the petition of the said petitioner, C. N. Bevan, be and the same hereby is dismissed, and he is remanded to the custody of the said Joseph Zimmerman, Sheriff of Lucas County, Ohio; and it is further ordered that the said petitioner pay the costs of this proceeding.

[fol. 99] To all of which orders, judgments and decrees of the court the said petitioner, C. N. Bevan, excepts.

On the 22nd day of June, 1932, being the 32nd day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2691

Ex Parte C. N. Bevan

This cause came on to be heard on the petitioner's motion for a new trial and was submitted to the court. Upon consideration thereof the court finds that said motion is not well taken and the same ought to be and hereby is overruled; to which action and order of the court the petitioner objects and excepts, and upon his application is given leave to prepare and file a bill of exceptions herein.

On the 29th day of June, 1932, being the 38th day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2691

Ex Parte C. N. Bevan

The petitioner's motion for an order suspending and staying execution of the judgment of this court discharging the writ of habeas corpus and remanding him to the custody of the Sheriff of Lucas County and dismissing his petition, having this day come on for hearing, the Court finds that said motion is not well taken and that it should be and the same is hereby denied.

To all of which petitioner excepts.

[fol. 100] No other Judgments or Decrees were rendered or Orders or Journal Entries made in said cause, as appears upon the Journal of said Court.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

THE STATE OF OHIO,
Lucas County, ss:

I, Geo. E. Hardy, Clerk of the Common Pleas and Courts of Appeal within and for the County of Lucas and State of Ohio, do hereby certify that the above foregoing Exhibits numbered 1 to 11 inclusive, contain all the original Pleadings, Process Papers and Records, and copy of opinion, and a full and true Transcript of all the Docket and Journal Entries in said cause and proceeding in said Court and in the Court of Common Pleas of said County, in cause No. 2691 C. A. Ex Parte C. N. Bevan.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

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[fol. 101] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. 2691

Ex Parte C. N. BEVAN

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 14, 1932

Your Petitioner, C. N. Bevan, respectfully represents that he is unlawfully imprisoned and restrained of his liberty by Joseph Zimmerman, Sheriff of Lucas County, Ohio, in the County Jail of said County, without any legal authority, but under color of a pretended commitment issued by one William Purcell, styling himself a Notary Public in and for the County of Lucas, State of Ohio, a copy of which alleged commitment is attached hereto.

Your petitioner further says that no questions were or could have been asked him in the pretended taking of his deposition referred to in said commitment, calling for answers or production of any books, papers and records which were relevant or material to any issue in said cause of Sielcken-Schwarz vs. The Woolson Spice Company, et al., #131925 in the Common Pleas Court of Lucas County; that in fact, as your petitioner is advised, the petition in the cause in which it was attempted to take said deposition is demurrable because it does not state facts sufficient to constitute a cause of action, because the plain-

tiff has not legal capacity to sue and for other reasons, and, as hereinafter set forth, a demurrer on said grounds and other grounds is now in fact pending in the Court of Common Pleas of Lucas County, Ohio; that the subpœna which was served on your petitioner purporting to require him to appear before a notary public and to produce books, papers and records (a copy of which subpœna is hereto attached) was illegal and void and called for the production of books, papers and records, without any adequate or definite description thereof or any designation of which thereof plaintiff claims to be relevant or material in said action; that petitioner is informed and believes and therefore avers that proper notice of the taking of said pretended deposition, such as to make it admissible in evidence on the trial of this cause, has not been made in that service of such notice [fol. 102] has not been made upon all of the defendants in said cause, and in that summons has not been served upon all of the defendants in said cause and cannot be served upon The Irving Trust Company, as Executor, one of said defendants; that petitioner is a resident of Lucas County, Ohio, in good health, and in every way capable of and expecting to appear at the trial of this cause in the Court of Common Pleas of Lucas County, Ohio, if called as a witness.

Petitioner further avers that the subpœna duces tecum served upon him, as aforesaid, constitutes an attempted unreasonable search and seizure such as is forbidden by the Constitution of the State of Ohio, including Section 14 of Article I thereof, among others, and by the Fourteenth Amendment to the Constitution of the United States, and that William Purcell, the Notary Public, before whom said depositions were, according to said pretended notice, to be taken, has attempted to exercise judicial power in violation of Section 1 of Article IV of the Constitution of Ohio by issuing the warrant for the arrest of your petitioner under which petitioner is, as aforesaid, now unlawfully restrained of his liberty by the Sheriff of this County. Petitioner says that he has been deprived of his liberty without due process or course of law and in violation of Section 1 of Article IV, Section 14 of Article I and Section 16 of Article I of the Constitution of the State of Ohio and in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner further says that one of the defendants in said cause did on the 11th day of June, 1932, file a demurrer to the petition therein upon the grounds, among others, that plaintiff has not legal capacity to sue, and that the petition does not state facts showing a cause of action, and did on the said date file a brief in support of said demurrer, which said demurrer is pending in said Court of Common Pleas of Lucas County, Ohio, and certain of the defendants in said cause did, on or about the 4th day of June, 1932, file in said cause a motion to quash notice to take depositions and subpœnas duces tecum, and for an injunction, enjoining and restraining plaintiff and her attorneys from taking depositions in said cause until such time, if any, as might be fixed by said Court of Common Pleas for so doing, which said motion and a supplement thereto praying for an injunction against the further taking of the afore-[fol. 103] said deposition, are now pending before said Court of Common Pleas. Said demurrer, motion and supplement to said motion have not been decided and no orders have been issued upon them.

Petitioner is advised and says that said demurrer, motion and supplement to said motion, are well taken and should be sustained and granted.

Petitioner further says upon information and belief that plaintiff was not in good faith in attempting to take his testimony, as aforesaid, and that it was not the intention of plaintiff or her expectation that said testimony should be transcribed or used in the trial of said cause, except for the purpose of endeavoring to learn and ascertain facts and information to which plaintiff is not lawfully entitled, and for the purpose of endeavoring to learn and ascertain the means by which certain of the defendants in said cause expected and intended to establish their defenses to the alleged claims asserted by plaintiff in her petition against said defendants.

Wherefore petitioner prays that a writ of habeas corpus be issued to the said Joseph Zimmerman, Sheriff of Lucas County, Ohio, and that petitioner be discharged from said imprisonment and restraint of his liberty.

Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

*Duly sworn to by C. N. Bevan. Jurat omitted in printing.*

[fol. 104] IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

SUBPŒNA DUCES TECUM

C. N. Bevan, Secretary-Treasurer the Woolson Spice Company, Summit Street, Toledo, Ohio:

You are hereby commanded to appear before the undersigned, a Notary Public within and for the County of Lucas, State of Ohio, at the office of Fraser, Hiett, Wall & Effler, Seventh Floor of the Home Bank Building, Toledo, Ohio, at nine thirty o'clock A. M., on Monday, June 13, 1932, and then and there give evidence as a witness on behalf of the plaintiff in the above entitled action; and you will, and at that time and place, produce and have with you the following papers and records:

1. The books, papers and records of The Woolson Spice Company of Toledo, Ohio, by whatever name called, containing records and entries showing the following.

(a) The ownership and all transfers of the corporate stock of said company from the year 1908 to 1932, inclusive, and any and all options and/or contracts for the purchase or sale of any of said corporate stock, during the same period of time.

(b) All records showing the declaration and payment, and to whom paid, of any and all cash and/or stock dividends declared and paid by The Woolson Spice Company from the year 1916 to 1932 inclusive.

(c) A complete list of stockholders, officers and directors of said company for each year during the period from 1909 to 1932 inclusive.

[fol. 105] (d) All records and minutes of all meetings of the stockholders of The Woolson Spice Company from 1908 to 1932 inclusive.

(e) The annual accountings and financial statements of The Woolson Spice Company from the year 1908 to 1932 inclusive.

(f) The stock inventories, records of purchase and sales, operating costs and expenses, profits and/or losses of The Woolson Spice Company during the years 1916 to 1932 inclusive.

(g) Detailed records of purchases and sales and contracts therefor of The Woolson Spice Company during the years 1917 and 1918.

and you will also produce and have with you at said time and place all correspondence on file in the office of The Woolson Spice Company with any and all of the following individuals and corporations and partnerships, from the years 1916 to 1932 inclusive:

John W. Koehrman, Toledo, Ohio.
William A. Brigham, Toledo, Ohio.
Franklin H. Biggs, Toledo, Ohio.
Marion M. Miller, Toledo, Ohio.
Frank D. Stranahan, Toledo, Ohio.
Robert A. Stranahan, Toledo, Ohio.
The Columbia Trust Company, New York.
The present and former officers, directors, stockholders, agents and employees of The Columbia Trust Company, New York.
George E. Warren, New York.
Willard V. King, New York.
The Alien Property Custodian, Washington, D. C.
The present and former directors, agents, representatives and attorneys of The Alien Property Custodian, Washington, D. C. and New York.
Thorlief Nielsen, New York.
John S. Sorenson, New York.
Sorenson and Nielsen, New York.
Arthur Young and Company, New York.
The present and former partners, agents and employees of Arthur Young and Company, New York.
Arthur Young, New York.
D. D. McKenzie, New York.
A. Vander Sommen, New York.
S. P. Jermain, Toledo, Ohio.

2. You will also have and produce at said time and place, the entire correspondence file of The Woolson Spice Company and any of its officers and agents with Herman Sielcken, New York, N. Y., and with Crossman and Sielcken, New York, N. Y., from the years 1895 to 1918 inclusive.

3. You will also produce and have with you at said time [fol. 106] and place, all correspondence of The Woolson Spice Company with any and all of its officers, directors, stockholders, agents, employees and customers during the years 1917 and 1918.

Hereof fail not under penalty of the law.

Given under my hand and seal at Toledo, Ohio, this 7th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Seal.)

(Rubber stamp:) William Purcell.

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[fol. 107] In Court of Common Pleas of Lucas County, Ohio

No. 131,925

State of Ohio,
County of Lucas, ss:

Notary's Order of Commitment

To Joseph Zimmerman, sheriff, Lucas County, Ohio:

Whereas, on the 13th day of June, 1932, in a certain action then and since June 2, 1932, and still pending in the Court of Common Pleas of Lucas County, Ohio, wherein Clara Sielcken Schwarz is plaintiff, and The Woolson Spice Company et al., are defendants, Number 131,925 on the docket of said Common Pleas Court of Lucas County, Ohio, the undersigned, William J. Purcell, a Notary Public in and for said County and State, at the office of Fraser, Hiett, Wall and Effler, in said County and State, and at the request of said plaintiff in said cause, and pursuant to a notice duly served upon The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan, defendants in said cause, was

taking the deposition of witnesses in said action, and C. N. Bevan, a resident of said County of Lucas and State of Ohio, then and there appeared as a witness on behalf of said plaintiff in response to a subpœna, and was sworn and examined, and upon his examination as a witness, and while his deposition was then and there being taken, and for the purpose of making the answers thereto a part of said deposition, and for the purpose of causing the production of books, records and papers referred to in said examination, and in a subpœna duces tecum served upon said witness, the following proceedings were had, including, the questions propounded to the witness, the answers thereto wherever answers were made, the objections and remarks of counsel, the orders of the undersigned, directed to the witness, and the refusals of the witness to answer, and refusals of the witness to produce said records and documents, wherever said refusals occur:

[fol. 108] Transcript of Proceedings Before Notary

June 13, 1932—9:30 o'clock A. M.

Mr. Welles: On behalf of the Defendants, the Woolson Spice Company, J. W. Koehrman, Robert A. Stranahan, Frank D. Stranahan and Franklin H. Biggs, Messrs. Stuart S. Wall, Harry S. Bugbee and George D. Welles appear for the purpose only of protesting against this illegal attempt to take depositions and state that in our opinion, and until the Court shall otherwise rule, we shall take the position that the Plaintiff has no right to take the depositions of the witnesses who have been subpœnaed, or any other witnesses, for the reasons, among others, that the petition is demurrable and raises no issue of fact upon which testimony can be taken and a demurrer in fact has been filed and is now pending on the ground, among others, that the petition does not state facts sufficient to constitute a cause of action. We further rely upon the other points made in the demurrer, among others, that the Plaintiff has no legal capacity to sue, and, hence, has no right to take the depositions.

We further rely upon, and direct attention to the fact, that summons has not been served upon one of the Defendants in this cause; that notice to take these depositions has not been served upon the same Defendant, namely, Marion

M. Miller, and so far as we are advised, there has been no legal service of notice upon the Irving Trust Company, Executor, and there has been no legal service of summons upon the Irving Trust Company, Executor, and that company is not and cannot, we believe, legally be made a party defendant as Executor in this cause.

We further rely upon and protest against the taking of the depositions on the ground that the time allowed for any attempt to comply with the subpœnas for Bevan and Koehrman has been entirely too short and it has been impossible to make a complete examination and check of the files. Further, that the subpœnas for the witnesses Bevan and Koehrman are far too broad and indefinite and they constitute an attempt at unreasonable search and seizure [fol. 109] and violation of due process of law, an infringement of the constitutional rights of the witnesses and of the Defendants under the Constitution of Ohio and under the Fourteenth Amendment to the Constitution of the United States. Lastly, that this attempt to take depositions is not one such as is permitted by law but is a mere fishing expedition started in the hope that possibly something may be found which will enable the Plaintiff to state a cause of action.

For the above reasons, among others, not waiving any rights whatsoever, we object and protest to the taking of any testimony at this time. In addition to this special appearance for the Defendants, we appear as counsel for the witness, C. N. Bevan.

Mr. Jackson: Let the record show that a week ago today depositions were noticed for taking in this case; that before that time, the defendants served notice of a motion to be heard on that morning seeking to quash the service of the notice and the service of the subpœnas then made, and asking for an injunction against the taking of depositions by the Plaintiff in this case on that notice and on the subpœnas then issued; that during the course of a hearing upon the motion had on that day, and at the suggestion of the Judge before whom the motion was heard, it was agreed among counsel now representing and then representing the Defendants and counsel for the Plaintiff, with the approval of the Court before whom the motion was noticed, the hearing on such motion should be continued indefinitely, that the depositions should go forward at this time and at this

place; that new notices and subpœnas would be issued to correct any possible technical objections to the manner of the issuance of the notice and the subpœnas; that the witnesses so subpœnaed would appear and answer questions; that counsel would make no objection on the ground that a demurrer was pending, if such should be the fact, although of course the Plaintiff wishes to state that such an objec-
[fol. 110] tion is without merit and unknown to the law; that witnesses were to be produced and the only limitation was that counsel would reserve the right to object to any questions propounded for any reason which is recognized in the law; that the witnesses, Koehrman and Bevan, if subpœnaed would appear with such of the books and records as they had been able to collect and that if they had not been able to collect all the records which were subpœnaed, they would nevertheless appear and we would go forward as we conveniently could; that the action which has just been taken by counsel for the Defendants is in direct violation of the conditions upon which a continuance was had a week ago today.

Mr. Welles: We regret to have any misunderstanding with counsel for Plaintiff but Mr. Jackson's recollection is entirely at error as to what took place last Monday. The hearing was continued indefinitely but with the distinct statement to Judge Gosline that either party should have the right to request the Court to resume the hearing at any time. It was not stated that the depositions should go forward and the witnesses would appear and answer questions, and that counsel would make no objection on the ground that there was a demurrer pending, and it is not correct that the only reservation was that counsel for the Defendants would raise objections to such specific questions as they might deem improper for reasons known to the law; nor was it stated that the witnesses would appear with such books and records as they had been able to find or with any books and records; nor was it stated that we would go forward with the depositions so far as we could with such books and records as the witnesses could find. On the contrary, the statement of counsel for Defendant was merely that if the hearing was put over until today that the two witnesses who had been subpœnaed would appear and

would answer some questions, what questions they would answer or how many they would answer counsel for Defendant said would be determined by counsel for Defendant on this occasion, and it was distinctly stated that if counsel [fol. 111] for Plaintiff thought that the Defendants were going to bring in their files in answer to such a blanket subpœna for counsel for Plaintiff to paw through and see what they could find, that they were very seriously mistaken; that nothing of that sort would be done until ordered by a Court. In exact compliance with what was then said, we have here Mr. Bevan, one of the two witnesses who were subpœnaed, with whom proceedings may go forward and at the conclusion of such questions as he may answer, if you desire to have Mr. Koehrman appear under the same statement, Mr. Koehrman will appear.

Mr. Fraser: Just a word. I was present when the agreement was made for the setting of these depositions at nine-thirty o'clock this morning. I very distinctly remember that we were discussing ten o'clock in the morning. Mr. Welles suggested it might be better to place it at nine-thirty and at his request nine-thirty was fixed and I remember very distinctly that I asked Mr. Welles whether at that time he would interpose a general objection upon the ground that he had on file, if he did file it—he did say he was going to file a demurrer—I said "Do you intend Monday morning next to interpose a general objection to the taking of this testimony on the ground that the demurrer is pending?" Mr. Welles very clearly and very distinctly said "I will not. The witnesses will answer questions. There will be no general objection upon that ground. If the questions are incompetent, we will object." In compliance of his suggestion of fixing the time at nine-thirty, all of it following as a stipulation, resulting in what Judge Gosline suggested, new notices were served and new subpœnas served. We insist we have the right to proceed and that these witnesses must attend.

Mr. Welles: It is my recollection Mr. Fraser is also in error in certain respects, even as to the time; that the time was suggested as nine o'clock but at my request it was changed to nine-thirty instead of nine and that the conversation with respect to the general objection was whether or [fol. 112] not we would instruct the witnesses not to testify at all on the ground that there was a demurrer pending and

I said that we would not, that the witnesses would answer some questions.

Mr. Bugbee: We didn't say how many.

Mr. Jackson: We do not desire, as counsel for the Plaintiff, to debate this matter further. It is obvious that we have been misled and whether or not any weasel words which could be interpreted differently than we understood them in reference to this misunderstanding in taking depositions, it is profitless to debate further and we may as well go forward.

Mr. Welles: I resent that statement and I want to make this clear that I said to Mr. Jackson and I said to Mr. Fraser last Monday morning, so that there might be no misunderstanding at all, that I wanted them to know that we intended to reserve and to raise every objection and ground of objection which we had or conceived that we had and would do so this morning.

Mr. Jackson: I want the record to show that of course if any such statement had been made, we would have gone forward and determined the matter before the Court had ended that morning. We would not agree to postponing for one week the solution of the problems which were raised if there were no advantage to be gained. We call Robert A. Stranahan who is under subpœna to appear here this morning. Can counsel for Mr. Stranahan state whether he is here?

Mr. Welles: I don't see him.

Mr. Jackson: Does he expect to be here shortly?

Mr. Welles: I haven't seen him. I don't know.

Mr. Jackson: We now call Mr. Frank Stranahan who is under subpœna to appear here as a witness this morning. Can counsel for Mr. Frank Stranahan state whether he is here or will be here shortly?

Mr. Welles: I don't see him here and I haven't seen him and I don't know.

[fol. 113] Mr. Jackson: Have counsel for Defendants given any instruction to Robert A. Stranahan or Frank Stranahan with reference to appearing here this morning?

Mr. Welles: I would say this, that the only two witnesses who had been subpœnaed last Monday were Mr. Koehrman and Mr. Bevan, and they were the two witnesses which we had in mind when we said witnesses would appear here.

Now you go ahead and don't ask me questions. You go ahead and say whatever you want to.

Mr. Jackson: I am saying whatever I want to, Mr. Welles. Can counsel for the Defendants answer the question as to whether Mr. Robert A. Stranahan or Mr. Frank Stranahan have been instructed to appear or not to appear here this morning?

Mr. Welles: I am not going to answer any more of your questions.

Mr. Jackson: We now call for Mr. John Koehrman who is under subpœna to appear here for his deposition this morning.

Mr. Welles: As I have stated, Mr. Koehrman will be here after you get through with Mr. Bevan.

Mr. Jackson: Has counsel for the defendant instructed Mr. Koehrman not to appear this morning at nine-thirty in response to his subpœna? We now ask to have the taking of these depositions adjourned until two o'clock this afternoon and an order for this witness to be here at that time, and an order issued to Mr. Bevan to be here with the records covered by his subpœna so far as he has been able to locate them by that time.

The Notary: Mr. Bevan, in compliance with your subpœna, you are ordered to be here this afternoon at two o'clock with the records which you are able to find.

Mr. Jackson: The taking of the depositions of the witnesses subpœnaed for this morning is continued then until two o'clock this afternoon at this same place described in the notice, is that right, Mr. Notary?

The Notary: Yes.

[fol. 114] Mr. Welles: We will notify you gentlemen of the Court's convenience between now and twelve o'clock, if possible. We will renew our application for an injunction.

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June 13th, 1932—2:00 o'clock p. m.

Hearing resumed.

Mr. Welles: We now renew our protest and objection against the taking of any depositions on the grounds stated this morning and on the additional ground that we have filed a supplement to our motion for injunction and re-

quested that a hearing at as early a date as possible be had and it has been set for hearing before the Court of Common Pleas, the Honorable Robert Gosline, Judge, at nine o'clock tomorrow morning, and notice has been served upon counsel for the Plaintiff to that effect.

Mr. Jackson: We now call Robert A. Stranahan as a witness, he having been subpœnaed to appear for his deposition before the Notary this morning at nine-thirty and at any adjournment thereof.

Mr. Welles: Mr. Stranahan was out of town this morning and is not feeling well this afternoon. Without waiving any of his rights or in any way subjecting himself to the jurisdiction of the Notary, he will, if desired, be willing to meet with you gentlemen here at nine o'clock tomorrow morning. I should say perhaps not nine o'clock, but immediately following the hearing in the Court of Common Pleas tomorrow morning.

Mr. Fraser: Where is he this afternoon?

Mr. Welles (continued): Depending upon the result of that hearing.

Mr. Fraser: Where is he this afternoon?

Mr. Welles: I don't know.

Mr. Jackson: We now call as a witness Frank D. Stranahan who is under subpœna to appear and give his deposition before the Notary, first this morning at this place at nine-thirty and at any adjournment of such depositions.

[fol. 115] Mr. Welles: I am advised that Mr. Frank D. Stranahan is not present in Lucas County but he is absent preparing for the trial of a law suit which will be for hearing in Bowling Green tomorrow where he will be tomorrow in attendance upon the Court of Common Pleas there.

Mr. Jackson: We call as a witness John W. Koehrman who was under subpœna to appear before the Notary to give his deposition at this place at nine-thirty this morning and at any adjournment of the taking of such depositions.

Mr. Welles: Without waiving any rights or submitting himself to the jurisdiction of the Notary, Mr. Koehrman will come over here and meet with you gentlemen this afternoon, whenever you are through with Mr. Bevan who is now here.

Mr. Jackson: Where is Mr. Koehrman?

Mr. Welles: He is around some place.

Mr. Jackson: Is Mr. Koehrman staying away on advice of his counsel?

Mr. Welles: I am not on the stand, Mr. Jackson.

Mr. Jackson: We call C. N. Bevan.

Mr. Welles: We object to Mr. Bevan being sworn for the reasons previously stated but if he wishes he may submit to being sworn.

C. N. Bevan, being first duly sworn according to law, testified as follows:

Examination by Mr. Jackson:

Q. Mr. Bevan, are you the Secretary-Treasurer of The Woolson Spice Company, the Defendant?

Mr. Welles: We object to this and each and every question which may be asked Mr. Bevan upon the grounds previously stated for objecting to this deposition, saying that on behalf of the defendants. As representing Mr. Bevan, I see no objection to his answering that question.

A. At the present time, you mean?

[fol. 116] Q. Yes.

A. Yes sir.

Mr. Jackson: Let the record show we call Mr. Bevan for cross-examination under the statute.

Q. Give your full name and residence, Mr. Bevan.

A. Charles N. Bevan, 211 West Delaware, Toledo, Ohio.

Q. And that is in Lucas County, in this State?

A. Yes sir.

Q. How long have you been connected with The Woolson Spice Company in any capacity?

A. Thirty-eight years.

Q. And what would that be, if you have arithmetically figured out as the date when you became such?

A. 1894.

Q. How long have you been Secretary-Treasurer?

A. Since October 1st, 1918.

Q. Is that the first office which you held with The Woolson Spice Company?

A. No sir.

Q. What offices if any did you hold before?

A. Treasurer.

Q. How long did you hold that before 1918?
A. January of 1918. I was elected January, 1918.
Q. You were elected Treasurer at that time?
A. Treasurer, yes sir.
Q. Was that the first office that you ever held?
A. Yes sir.
Q. In what capacity had you been employed generally from 1894 down to the time that you were elected Treasurer of The Woolson Spice Company?
A. Bill clerk, bookkeeper, credit man, Treasurer, Secretary-Treasurer.
Q. Are you a stockholder of The Woolson Spice Company?

Mr. Welles: We object. You needn't answer that unless [fol. 117] you want to, on the ground that it is not material to any issue and there is no issue raised by the petition.

A. You mean at the present time?

Mr. Welles: You needn't answer that, Mr. Bevan.

Q. Yes, at the present time.

Mr. Welles: I think perhaps we will save time if I should state what we regard as any questions the witness will submit to, that is, if you have some papers, records or documents in your possession which you desire him to identify and he can, we do not object to his doing so.

Mr. Jackson: We appreciate the graciousness of counsel but we will ask the questions as we see fit and then if counsel cares to object, it will be noted and I presume a ruling will be made in due course.

Q. Do you refuse to answer the question, Mr. Bevan?
A. On advice of counsel.
Q. Do you have any other reason for not wanting to answer the question?
A. No sir.
Q. Do you claim it might incriminate you?
A. No sir.

Mr. Jackson: We ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Are you a stockholder of The Woolson Spice Company?" and I, as Notary, now order you to answer the question.

A. I am.

Q. How long have you been a stockholder, Mr. Bevan?

Mr. Welles: We object, and I think I should explain to Mr. Bevan that the question of whether or not you shall answer these questions will be determined by the Court and not by the Notary. The Notary may order you to answer and the Court will then determine whether his order is valid or not.

[fol. 118] Q. Mr. Bevan, will you produce the subpœna served on you, the one that was served on Tuesday last?

A. I haven't that with me, not Tuesday.

Q. Well, the last one?

A. Oh, the last one?

Q. Yes.

A. Yes sir.

Mr. Jackson: The witness has produced a subpœna which was served upon him; the subpœna bears date of June the 7th and we ask to have this marked as "Bevan Exhibit 1."

Q. Mr. Bevan, I direct your attention to the word "none" written opposite the sub-paragraph (a) of paragraph 1 of Bevan Exhibit 1 and ask you who wrote that?

A. I can't tell you. It is not my writing.

Q. It isn't your handwriting?

A. No sir.

Q. Do you know Mr. Koehrman's handwriting?

A. I do.

Q. Is it Mr. Koehrman's handwriting?

A. It don't look like it.

Q. Do you know Mr. Welles' handwriting?

A. No sir, I never saw it.

Q. Do you know Mr. Marshall, E. J. Marshall's handwriting?

A. I have seen that.

Q. Is that his handwriting?

A. No sir, I don't think so, no sir.

Q. Are you sure about it?

A. Yes sir.

Q. Now, I direct your attention to the word "no" written in lead pencil opposite sub-paragraph (f) of paragraph 1 on Bevan Exhibit 1 and ask you whether that is in your handwriting?

A. Yes sir.

Q. When did you write that there?

A. I don't recall the exact time or when, just what day I [fol. 119] wrote it. That is mine right there, yes sir.

Q. Why did you write it?

Mr. Welles: We object. You needn't answer.

Q. What is your answer?

Mr. Welles: The witness declines to answer on the advice of counsel.

Mr. Fraser: Let him say it.

Mr. Welles: I am saying it.

Mr. Fraser: No, don't you testify, George.

A. I refuse to answer that question on the advice of counsel.

Q. Have you any other reason for not wanting to answer?

A. No sir.

Q. Do you claim it might incriminate you?

A. No sir.

Q. Mr. Bevan, have you with you the records and minutes of the meetings of the stockholders and of the directors of The Woolson Spice Company for 1917 and 1918?

A. No sir.

Q. Did you make a search for them?

A. Yes sir.

Q. Are they in your custody?

A. They are.

Q. And you read the subpœna, that part of it which directed you to produce all records and minutes of all meetings of the stockholders and meetings of the directors and executive committees of The Woolson Spice Company from 1908 to 1932 inclusive, did you?

A. Yes sir.

Q. And did you understand what books or records that called for?

A. Yes sir.

Q. Why have you not them here?

A. They are not here on advice of counsel.

Q. That is, you deliberately refuse to produce any of the records or minutes of the stockholders for any of the [fol. 120] years from 1908 to 1932, referring to the records of The Woolson Spice Company, is that right?

A. That is right.

Q. And do you now refuse to produce them?

A. On advice of counsel I do.

Q. What counsel advised you not to produce them?

A. The Woolson Spice Company's counsel, acting in my behalf.

Q. Acting in your behalf?

A. Yes, my counsel.

Q. Well, who are they?

A. Mr. Welles.

Q. That is, Mr. Welles who is here as attorney for the Defendants advised you not to produce these records, is that right?

A. That is right.

Mr. Welles: That is right.

Q. Now Mr. Bevan, have you the records of the minutes of the meetings of the directors of The Woolson Spice Company for any of the years 1908 to 1932 inclusive?

A. I have.

Q. They are in your custody, is that right?

A. They are in my custody, yes sir.

Q. And are they kept in the offices of the company at the plant here in Toledo?

A. Yes sir.

Q. That is true of the records of the minutes of the stockholders' meetings?

A. Yes sir.

Q. They are all now there, are they?

A. No sir, they are not there now.

Q. Where are they?

A. In the hands of our counsel.

Q. That is, the records of the meetings of the stockholders of The Woolson Spice Company from 1908 to 1932 are in the hands of some one of your counsel now?

[fol. 121] A. Yes sir.

Q. Which of your counsel has them?

A. I don't know that. I can't answer that question.

Q. To whom did you deliver them?

A. Delivered them to Mr. Wall.

Q. To Mr. Wall, who appears here representing the firm of Marshall, Melhorn, Marlar & Martin?

A. Yes sir.

Q. When did you do that?

A. Why, preceding the first subpœna.

Q. Preceding?

A. Immediately following the first subpœna that I received. It was last Thursday a week ago.

Q. Now, what about the records of the meetings of the directors of The Woolson Spice Company; where are they now?

A. They are in the same book.

Q. In the same book?

A. Yes sir.

Q. And the same book that was delivered to Mr. Wall?

A. Yes sir.

Q. And that delivery was made last Thursday?

A. Yes sir.

Q. Well, you had been served with a subpœna in this case before last Thursday, hadn't you?

Mr. Welles: We object. You needn't answer that.

Mr. Jackson: This is cross-examination.

A. No sir, not in this case before last Thursday. A week ago last Thursday, June 2nd.

Q. Oh, I see. I thought you were speaking of Thursday of the week past.

A. No sir.

Q. Now, where are the minutes of the meetings of the executive committee of The Woolson Spice Company?

A. I have never seen any records of any meetings of the [fol. 122] executive committee of The Woolson Spice Company.

Q. Does the Woolson Spice Company have an executive committee?

Mr. Welles: We object. I think we have no- gone far enough for you to raise any questions you want to raise and if you want to ask any questions which you regard as important to raise the question of your rights here, I suggest you do so. I advise Mr. Bevan that it is unnecessary for him to answer any further questions.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Does The Woolson Spice Company have an executive committee?" and I, as Notary, now order you to answer the question.

Mr. Welles: The Court will determine whether that is a valid order or not, Mr. Bevan. I advise you to await the Court's ruling on it.

Q. Mr. Witness, you heard the Notary order you to answer the question. What do you answer?

Mr. Welles: The witness declines to answer.

Mr. Fraser: Oh no, he hasn't declined. Let him say something.

A. Well, I will decline to answer that on the advice of counsel.

Q. Mr. Bevan, I direct your attention to sub-paragraph (e) of paragraph 1 of Bevan Exhibit 1 reading "The annual accountings and financial statements of The Woolson Spice Company from the year 1908 to 1932 inclusive." Have you those annual accountings or financial statements for those years or any of them with you?

A. Will you give me the years again, please?

Q. 1908 to 1932 inclusive.

A. With me?

Q. Yes.

A. No sir.

Q. Are there annual accountings or financial statements [fol. 123] of The Woolson Spice Company for any of the years from 1908 to 1932 inclusive in the records of the company?

A. Yes sir.

Q. Are there such annual accountings or financial statements for each of those years.

A. I am not sure about how far from 1908 on it goes.

Q. Do they commence in 1908?

A. I would have to refer to the record on that. I couldn't answer that question.

Q. Well, you know that there are such annual accountings and financial statements for some of those years?

A. Yes sir.

Q. Now, can you recall for which ones of those years to your knowledge there are such accountings or statements?

Mr. Welles: We object. You needn't answer that question.

Mr. Jackson: We ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Now, can you recall for which ones of those years to your knowledge there are such accountings or statements" and I, as Notary, now order you to answer the question.

A. I refuse to answer upon the advice of counsel.

Q. Mr. Bevan, you read this sub-paragraph (e) of paragraph 1 of Bevan Exhibit 1 when it was served upon you, didn't you, the one I just read to you?

A. Yes sir.

Q. And you understood what was meant by annual accountings or financial statements?

A. Yes sir.

Q. Did you examine the records of The Woolson Spice Company in your custody to determine what if any such annual accountings or financial statements there were?

Mr. Welles: We object. You needn't answer.

Mr. Jackson: I ask the Notary to order the witness to [fol. 124] answer the question.

The Notary: The question is, Mr. Bevan, "Did you examine the records of The Woolson Spice Company in your custody to determine what if any such annual accountings or financial statements there were?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advise of counsel.

Q. Such annual accountings and financial statements of The Woolson Spice Company from the year 1908 to 1932 as are in existence are in your custody now, are they?

A. Yes sir.

Q. And where are you keeping them, in the offices of The Woolson Spice Company?

A. Yes sir.

Q. Have they been removed from there at any time since the service of this subpœna?

A. No sir.

Q. And have you examined the file at any time since the service of this subpœna?

Mr. Welles: You needn't answer that one. Object.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "And have you examined the file at any time since the service of this sub-

pœna?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advice of counsel.

Q. Mr. Bevan, I direct your attention to sub-paragraph (a) of paragraph 1 of Bevan Exhibit 1 reading "The ownership and all transfers of the corporate stock of said company from the year 1908 to 1932 inclusive; and any and all options and/or contracts for the purchase or sale of any of said corporate stock, during the same period of time". Did you read that when the subpœna was served upon you?

A. I did.

Q. And has The Woolson Spice Company any records of [fol. 125] the ownership of its stock for any of the years from 1908 to 1932 inclusive?

A. Yes sir.

Q. And are such records of the stock ownership of The Woolson Spice Company in your custody as Secretary?

A. Yes, sir.

Q. And where are you keeping them?

A. In the offices of the company.

Q. Have you produced any of those records here today?

A. No sir.

Q. Did you understand that this subpœna purported to direct you to produce such stock records here today?

A. Yes sir.

Q. Why did you not produce them?

A. I did not produce them on the advice of counsel, of our counsel.

Q. When you say "on the advice of our counsel" you mean Mr. Welles?

A. Yes sir.

Q. Did you counsel with any one else about it?

A. No, sir.

Q. Will you now produce the stock records of the company for the years from 1908 to 1932?

Mr. Welles: I advise the witness that it would be improper for him to do so as they are corporate records which should not be exposed to the gaze of strangers to the corporation, persons who have no right to see them, and that there is no valid order outstanding for their production here until the Court holds otherwise.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Will you now produce the stock records of The Woolson Spice Company for the years from 1908 to 1932?" and I, as Notary, now order you to answer the question.

A. I refuse to answer it on the advice of counsel.

Q. Will you produce the stock transfer records of The [fol. 126] Woolson Spice Company for the year 1918?

Mr. Welles: I give the witness the same advice; until the Court so orders, it will not be necessary or proper for him to produce them here.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Will you produce the stock transfer records of The Woolson Spice Company for the year 1918?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advice of counsel.

Q. That is, you refuse to say whether you will or will not produce them?

A. Yes sir, whether I will or will not.

Mr. Jackson: That is a commendable caution on the part of counsel, I should think.

Q. Mr. Bevan, are there in the files and records of The Woolson Spice Company any original or copies of any options or contracts for the purchase or sale of any of the corporate stock of The Woolson Spice Company during the year 1918?

Mr. Welles: I advise the witness that that is a question that is neither necessary or proper for him to answer and object to it.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Mr. Bevan, are there in the files and records of The Woolson Spice Company any original or copies of any options or contracts for the purchase or sale of any of the corporate stock of The Woolson Spice Company during the year 1918?" and I, as Notary, now order you to answer the question.

A. I refuse to answer that on the advice of counsel.

Q. I similarly ask you whether there are in the files and records of The Woolson Spice Company any originals or [fol. 127] copies of contracts for the purchase or sale of the corporate stock, or any of it, of The Woolson Spice Company during the years 1919, 1920 and 1921?

Mr. Welles: I similarly give the witness the same advice.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "I similarly ask you whether there are in the files and records of The Woolson Spice Company any originals or copies of contracts for the purchase or sale of the corporate stock, or any of it, of The Woolson Spice Company during the years 1919, 1920 and 1921?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advice of counsel.

Q. Mr. Bevan, directing your attention to sub-paragraph (a) of paragraph 1 of Bevan Exhibit 1, state if you know whether the notation of the word "none" in pencil opposite that part of sub-paragraph (a) of paragraph 1 of said exhibit relating to options and/or contracts for the purchase or sale of any of said corporate stock during the same period of time, referring to the Woolson corporate stock and the period from 1908 to 1932 is intended to indicate that there are no such options or contracts or copies thereof in the files of the company.

Mr. Welles: I advise the witness, until the Court otherwise rules, he needn't answer that question and object to it.

Q. What is your answer?

A. I refuse to answer on the advice of counsel.

Q. Now Mr. Bevan, I direct your attention to sub-paragraph (b) of paragraph 1 of Bevan Exhibit 1 and ask you whether you have with you any of the records therein described, being records relating to the declaration and payment of cash or stock dividends by The Woolson Spice Company from 1916 to 1932?

A. I have not.

Q. Are there records of declarations of such dividends and payments in the files?

[fol. 128] Mr. Welles: Mr. Bevan, we now advise you that in our opinion until the Court has had an opportunity to

rule upon this proceeding that it is unnecessary for you to answer any more questions at all upon any subject and we suggest that you decline to answer any further questions until such time as the Court of Common Pleas, or other Court, has determined whether or not this proceeding is proper and whether these questions are proper.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Are there records of declarations of such dividends and payments in the files?" and I, as Notary, now order you to answer the question.

A. I decline to answer.

Q. Do you refuse to produce any such record of declaration and payments by The Woolson Spice Company?

A. I do.

Q. Now Mr. Bevan, I show you Bevan Exhibit 1 and ask you whether you refuse to produce any of the papers described in that subpœna?

A. I refuse to answer on the advice of counsel.

Q. When did your counsel advise you on that question, Mr. Bevan?

A. He just did advise me to refuse.

Q. Have you produced any of the papers or records described in this subpœna marked Bevan Exhibit 1?

A. Here at this meeting you mean?

Q. That is right.

A. No sir.

Q. You read this subpœna, Exhibit 1, and understood that it purported to direct you to produce the various records and papers described therein?

Mr. Welles: My advice to Mr. Bevan is that until the Courts otherwise rule, that you decline to answer any and all further questions in this deposition.

Mr. Jackson: I ask the Notary to order the witness to [fol. 129] answer the question.

The Notary: The question is, Mr. Bevan, "You read this subpœna, Exhibit 1, and understood that it purported to direct you to produce the various records and papers de-

scribed therein?" and I, as Notary, now order you to answer the question.

A. I decline to answer on the advice of counsel and I decline to answer any further questions on the advice of counsel.

Mr. Jackson: Now Mr. Notary, we now move for an adjournment of the taking of the depositions until nine o'clock tomorrow morning at the same place described in the notice.

Mr. Welles: We direct the Notary's attention to the fact that there is an application pending before Judge Gosline for an injunction restraining counsel for Plaintiff and restraining the Notary himself from proceeding further with this deposition and we request the Notary to make no order of adjournment which would conflict with Judge Gosline's assignment of that motion for hearing. We make that request on behalf of witnesses and not on behalf of Defendants. We are here to object on the behalf of defendants.

Mr. Jackson: I ask the Notary to enter an order adjourning the taking of these depositions until tomorrow morning at nine o'clock at the same place fixed in the notice.

The Notary: The depositions will be continued until tomorrow morning at nine o'clock.

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[fol. 130] As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a Notary Public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a Notary Public, then and there for the said contempt of the said C. W. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the County jail until he submit to testify in the premises.

The undersigned, a Notary Public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached marked Exhibit A; and that said books, records and documents are properly and legally described and identified in the subpœna duces tecum which was served on the witness,

C. N. Bevan, on the 7th day of June, 1932, copy of which subpœna duces tecum is hereto attached and marked Exhibit B.

You are, therefore, ordered to arrest and commit the body of said C. N. Bevan to the jail of the said County of Lucas until he shall submit to testify as aforesaid, and of this make legal service and due return.

Given under my hand and official seal this 13th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Notarial Seal.)

(Rubber stamp:) William Purcell.

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[fol. 131] In Court of Appeals of Lucas County, Ohio

C. A. 2691

Ex Parte C. N. Bevan

Amendment to Petition for Writ of Habeas Corpus—Filed June 15, 1932

Now comes petitioner C. N. Bevan and by leave of court files this amendment to his petition for writ of habeas corpus herein and without waiving or in any extent abandoning any allegations in his original petition, alleges:

1. That a true copy of the petition in the cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County, Ohio, referred to in petitioner's original petition herein, is hereto attached, marked "Exhibit A", and made a part hereof.

2. That for the reasons set forth in petitioner's original petition herein and for the additional reasons set forth in this amendment to said petition, William Purcell, the Notary Public by whose pretended order your petitioner was arrested and held by the Sheriff of Lucas County, Ohio, had no jurisdiction to take your petitioner's deposition in said cause, to issue a subpœna for your petitioner, to order your petitioner to answer any question or to make any order or

issue any warrant for the arrest or imprisonment of your petitioner until he submit to testify in the premises, or otherwise.

3. Your petitioner respectfully shows the court that the pretended order for the arrest of your petitioner, of which a copy is attached to the petition herein, purports to contain [fol. 132] an attempted adjudication by said Notary Public that your petitioner is guilty of contempt in refusing to answer certain questions and in refusing to produce certain books, papers and documents before said Notary Public, and that said pretended order and attempted adjudication was made by said Notary Public in the absence of your petitioner and without notice to him; that your petitioner was not allowed to appear and defend in person and with counsel against said alleged charge of contempt, and was given no opportunity to demand the nature and cause of the accusation, if any, against him prior to the making of said attempted adjudication by said Notary Public and did not receive and was given no opportunity to demand a copy of the accusation against him prior to said attempted adjudication, and your petitioner was, by said conduct and attempted adjudication of said Notary Public, deprived of his rights under Section 10 of Article I of the Constitution of Ohio and of his rights under the Fourteenth Amendment to the Constitution of the United States; that said Notary Public as shown by his said order of commitment, unlawfully assumed and attempted to exercise judicial power not only by adjudicating that your petitioner was in contempt, as aforesaid, but further by proceeding to "adjudge that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed" in said cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company et al., and that said Notary Public further illegally and wrongfully attempted to exercise judicial power, as shown in said order of commitment, by adjudging "that said books, records and documents are properly and legally described and identified in the subpœna duces tecum which was served on the witness C. N. Bevan on the 7th day of June, 1932"; that said Notary Public had no jurisdiction to adjudicate [fol. 133] any of said questions; that his attempted adjudication thereof was without hearing or notice to your peti-

tioner; and that said notary public did not submit to the Court of Common Pleas for adjudication and determination the questions as to whether said books, papers and documents which he ordered your petitioner to produce and the questions which he ordered your petitioner to answer are material to any issues in said cause.

4. Said Notary Public, William Purcell, was wholly disqualified to pass judgment or sentence of arrest and imprisonment upon your petitioner for the reason that said Notary Public had been employed by counsel for plaintiff in said suit of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., to act as notary and stenographer in the taking of the deposition of your petitioner and the transcribing thereof and that the amount of the compensation of said Notary Public for such service was dependent in large part, if not wholly, upon the number of pages of such testimony or evidence by way of exhibits which he might take and transcribe or copy; that it was to the pecuniary interest of said Notary Public that he should compel your petitioner to testify and produce books, papers and records before him so that such compensation might be earned by said Notary Public, and that said Notary Public was necessarily subject to the bias of his own personal pecuniary interest in determining whether or not a commitment should be issued for the arrest of your petitioner herein and his imprisonment until he submit to testify before said Notary Public, and for said reason said Notary Public's attempted adjudication that your petitioner was in contempt was void, and that said commitment was issued illegally and in violation of the Fourteenth Amendment of the Constitution of the United States.

[fol. 134] 5. That on the 14th day of June, 1932, after the Honorable Robert A. Gosline, Judge of the Court of Common Pleas of Lucas County, Ohio, before whom were pending the motions for injunction, etc., referred to in your petitioner's petition herein, had been informed that this proceeding in habeas corpus was to be filed herein, announced that he would overrule said motions for injunction unless they were voluntarily withdrawn by the defendants in said cause who had filed same and thereupon said motions were withdrawn by said defendants.

6. Your petitioner says that the only color of authority which said William Purcell had for the issuance of the order of commitment of your petitioner is by virtue of the provisions of Sections 11510, 11511 and 11512 of the General Code of the State of Ohio; that if said sections or any of them are or can be construed to authorize the issuance of the order of commitment herein by said William Purcell as Notary Public and the arrest and imprisonment of your petitioner by the Sheriff of Lucas County, Ohio, in pursuance of such order of commitment, then said sections of the statutes and each of them are void and unconstitutional by reason of the provisions of Section 1 of Article I, Section 5 of Article I, Section 10 of Article I, Section 14 of Article I, Section 16 of Article I, Section 1 of Article IV and Section 32 of Article II of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States, and are wholly ineffective to invest said Notary Public with lawful power or jurisdiction to take such actions and proceedings or any of them.

Wherefore your petitioner prays as in his petition herein.
Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

[fol. 135] *Duly sworn to by C. N. Bevan. Jurat omitted in printing.*

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[fol. 136] EXHIBIT "A" TO AMENDMENT TO PETITION

IN COURT OF COMMON PLEAS OF LUCAS COUNTY

No. 131,925

CLARA SIELCKEN-SCHWARZ, New York, N. Y., Plaintiff,

v.

THE WOOLSON SPICE COMPANY, a Corporation, 2700 Summit Street, Toledo, Ohio; John W. Koehrman, 1719 Superior Street, Toledo, Ohio; Franklin H. Biggs, 2613 Glenwood Avenue, Toledo, Ohio; Marion M. Miller, 2260 Scottwood Avenue, Toledo, Ohio; Frank D. Stranahan, Dixie Highway, Toledo, Ohio; Robert A. Stranahan, Ottawa Hills, Toledo, Ohio; Ammi F. Mitchell, 2057 Glenwood Avenue,

Toledo, Ohio, and LeRoy E. Eastman, 3416 Brookside Road, Toledo, Ohio, as Administrators of the Estate of William A. Brigham, Deceased; Irving Trust Company, a Foreign Corporation, as Executor of the Last Will and Testament of Herman Sielcken, Deceased, Society for Savings Building, Cleveland, Ohio, Defendants

PETITION FOR EQUITABLE RELIEF

The above named plaintiff, Clara Sielcken-Schwarz, for her cause of action against the above named defendants respectfully alleges and shows:

[fol. 137] 1. That the plaintiff, Clara Sielcken-Schwarz, at and prior to the time of the commencement of this action, was and now is a citizen of the United States and a resident of the State of New York, residing in the City and County of New York in said State.

2. That the defendant, Irving Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in New York City in said State; that said corporation is duly qualified to do business in Ohio and has appointed a statutory agent pursuant to the Ohio statutes and that said corporation is doing business in this State.

3. That the defendant, The Woolson Spice Company, at all times hereinafter mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and has its principal place of business at the City of Toledo, in said State; that at all times prior to, on or about July 25th, 1918, the total capital stock of said corporation consisted of 1,800 shares of common stock of a par value of One Hundred Dollars ($100.00) per share.

4. That the defendants, John Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan and Robert A. Stranahan, are citizens and residents of the City of Toledo, County of Lucas, State of Ohio, and that the defendants Ammi F. Mitchell and Leroy E. Eastman are the duly qualified and acting administrators of the estate of William A. Brigham, deceased, who at the time of his death

was a resident of the City of Toledo, County of Lucas, State of Ohio.

5. That Herman Sielcken, who was a citizen of the United States and domiciled in the City, County and State of New York, died on or about the 8th day of October, 1917, leaving a last Will and Testament wherein he appointed The Columbia-Knickerbocker Trust Company, a corporation [fol. 138] organized and existing under the laws of the State of New York, Executor of his said Will; that thereafter and on or about the 25th day of January, 1918, the said Will was duly admitted to Probate by the Surrogates Court of the County of New York, State of New York, and letters testamentary on the said Will were thereupon duly issued by one of said Surrogates to The Columbia Trust Company, a corporation organized and existing under the laws of the State of New York, as the successor of said The Columbia-Knickerbocker Trust Company; that thereafter and prior to the commencement of this action the defendant, Irving Trust Company, by certain mesne changes of corporate name, became and now is the continuation of the corporate entity and identify of said Columbia Trust Company and thereupon became the duly qualified and acting Executor of said Last Will; that the defendant, Irving Trust Company, has never been discharged as such Executor and that no other individual or corporation has been appointed Executor of said Last Will or administrator of the estate of said Herman Sielcken by said Surrogates Court or by any other court.

6. That said Herman Sielcken, in and by his Last Will and Testament, after providing certain specific legacies all of which have been fully paid and satisfied, gave, devised and bequeathed all the rest, residue and remainder of his property and estate, real and personal, whatsoever and wheresoever situate, absolutely to his wife, Clara Sielcken (by subsequent remarriage Clara Sielcken-Schwarz) who is the plaintiff herein, and that said plaintiff is now the full, complete, absolute and sole beneficial owner of all unadministered and undistributed assets of the estate of said Herman Sielcken.

7. That since the death of the said Herman Sielcken the plaintiff remarried and her present name is Clara Sielcken-Schwarz.

8. That heretofore and prior to the commencement of this action, the plaintiff duly requested the defendant, Irving Trust Company, as Executor of the Last Will and Testament of said Hermann Sielcken, deceased, to bring [fol. 139] this action in behalf of said estate and sought to persuade said defendant so to do, but that the said defendant has failed, neglected and refused to bring said action, and, therefore, this plaintiff has joined said Irving Trust Company, as such Executor, as a defendant in this action.

9. That at the time of his death said Herman Sielcken was the sole beneficial owner of 824 shares of the capital stock of the defendant, The Woolson Spice Company, said shares being registered on the books of the said corporation in the name of Crossman & Sielcken, under which name the said Hermann Sielcken carried on business; that in addition to said 824 shares there was registered on the books of the said corporation in the name of said Hermann Sielcken, 360 of said shares.

10. That on the 6th day of April, 1917, the Congress of the United States declared that a state of war existed between the United States and Germany and on the 6th day of October, 1917, the Congress of the United States enacted and the President approved the Act known as "The Trading with the Enemy Act."

11. That said Hermann Sielcken at the outbreak of war between the United States and Germany was, as the defendants and said William A. Brigham well knew, temporarily present in Germany on business in behalf of the defendant, The Woolson Spice Company.

12. Plaintiff is informed and believes that the said Herman Sielcken, in the year 1909 acquired by purchase thereof 1,739 shares of the common capital stock of the defendant, The Woolson Spice Company, out of the said total capitalization of 1,800 common shares; that said Hermann Sielcken from the year 1909 until in or about the month of September, 1917, was president and a director of the defendant, The Woolson Spice Company; that subsequent to the purchase by him of said 1,739 shares, said Hermann [fol. 140] Sielcken from time to time sold certain of said shares to various persons including the defendants, Koehrman and Biggs, and said William A. Brigham, but for a

large portion of said shares so sold said Hermann Sielcken did not receive prior to his death the purchase price, including the purchase price of the shares sold to said defendants, Koehrman and Biggs, and said Brigham, and held said shares so sold as collateral to secure the purchase price thereof; that prior to the ousting of said Hermann Sielcken as president of the defendant, The Woolson Spice Company, as hereinafter more specifically related, the said Brigham was secretary and a director, the defendant Koehrman was general manager and a director, and the defendant Biggs was superintendent and a director of the defendant, The Woolson Spice Company, and were intimately associated in the conduct of the affairs of said corporation with said Hermann Sielcken, who, as hereinbefore stated, owned or controlled a majority of the capital stock thereof and by reason of such control maintained the defendants, Koehrman and Biggs, and said Brigham, in their said positions; that because of their intimate association and acquaintance with the business of the defendant, The Woolson Spice Company, over a period of many years, the defendants, Koehrman and Biggs, and said Brigham were informed upon every detail of said business and well knew the prosperous condition of the affairs of the said corporation.

13. Plaintiff is informed and believes that in or about the month of September, 1917, it being well known to the defendants, Koehrman and Biggs, and said Brigham, that the said Hermann Sielcken was being detained in Germany by the exigencies of the said war between the United States and Germany, that the said Hermann Sielcken was then suffering from a prolonged and serious illness which prevented him from traveling, that even in the event of peace [fol. 141] between the United States and Germany his illness would indefinitely prevent him from returning to his domicile in the United States and that it would be impossible for him to frustrate their plans, said defendants, Koehrman and Biggs, and said Brigham, impelled by motives of avarice, ambition and hatred toward Hermann Sielcken, and in furtherance and as a part of a fraudulent conspiracy (conceived among them during the spring and summer of 1917) illegally and wrongfully to acquire the control of said The Woolson Spice Company from said Hermann Sielcken, and otherwise to defraud him and to

dominate, manage, control, manipulate and exploit said corporation in their own interests, caused to be held a pretended meeting of the Board of Directors of the defendant, The Woolson Spice Company, and by means of their control of the said Board of Directors in the absence of said Hermann Sielcken and without his knowledge or authority wrongfully and fraudulently ousted the said Hermann Sielcken from his office as President of defendant, The Woolson Spice Company, and also wrongfully and fraudulently ousted from his office as Treasurer of defendant, The Woolson Spice Company, one, S. P. Jermain, who, in his capacity as said Treasurer, for many years had been a trusted and loyal representative, associate and adviser of the said Hermann Sielcken, and proceeded to a pretended election of the said Brigham as President of defendant, The Woolson Spice Company; that thereafter and at all times mentioned herein and as a result of the aforesaid wrongful acts, the defendants, Koehrman and Biggs, and said Brigham controlled and dominated the defendant, The Woolson Spice Company, and controlled and regulated the public and private reports of its business, general condition and ownership of its stock, and did fraudulently manipulate the defendant, The Woolson Spice Company, and said reports for their own purposes, as here-
[fol. 142] inafter more specifically set forth.

14. Plaintiff is informed and believes that in justification of their action in ousting Sielcken and seizing control of The Woolson Spice Company and as a further step in the consummation of the said fraudulent conspiracy, the defendants, Koehrman and Biggs, and said Brigham, although they well knew that said Hermann Sielcken in his lifetime and at the time of his death was a citizen of the United States and domiciled in the City, County and State of New York and was not an enemy within the meaning of that term as defined in the "Trading with the Enemy Act", and although they well knew that said Hermann Sielcken had died on October 8, 1917, and that title to all his property in the United States had vested in The Columbia Trust Company as Executor, falsely and maliciously caused to be publicly announced and reported to the Alien Property Custodian that the said Hermann Sielcken was a resident of Germany and an enemy of the United States under the provisions of said "Trading with the Enemy Act", and

that said Hermann Sielcken was the owner of the shares of stock of said Woolson Spice Company hereinbefore mentioned; that the said defendants and said Brigham, by said false and malicious reports, intended to conceal and distract attention from their wrongful and fraudulent seizure of the control of The Woolson Spice Company in their own interests and hoped thereby to perpetuate and render easier and less likely of discovery their management, control, manipulation, and exploitation of said corporation in their own interests.

15. That upon the qualification of the said Columbia Trust Company as Executor of the said last Will and Testament of the said Hermann Sielcken and for the purposes of the due administration and distribution of said estate, title to the said 824 shares of stock of the defendant, The [fol. 143] Woolson Spice Company, and title to the interest of said Hermann Sielcken in said 360 shares of said stock, vested in said Columbia Trust Company as such executor.

16. Plaintiff is informed and believes that prior to or shortly after the appointment of The Columbia Trust Company as executor as aforesaid, the defendants, Koehrman and Biggs, and said Brigham broadened and enlarged the scope of their fraudulent conspiracy to include a plan to acquire the said 824 shares and the said 360 shares of the capital stock of the defendant, The Woolson Spice Company, for a grossly inadequate consideration for themselves and the defendants, Miller, Frank D. Stranahan and Robert A. Stranahan, to whom the said plan was communicated and who aided, abetted and participated in said fraudulent plan.

17. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy, wrongfully and illegally to acquire said stock at a grossly inadequate consideration, the defendants, Koehrman and Biggs, and said Brigham aided and abetted by sundry other persons, and taking advantage of their wrongful control and domination over the affairs of the defendant, The Woolson Spice Company, and taking advantage of their peculiar and superior knowledge of the affairs of said Company and of the necessity of the said Executor to rely upon them for information concerning the business of said Company, carried on a cam-

paign of misrepresentation calculated and designed to mislead and deceive the said Executor as to the value of said stock and as to the necessity of an immediate sale to avoid practically total loss. Plaintiff is further informed and believes that as part of said campaign of misrepresentation said individual defendants and said Brigham falsely and fraudulently misrepresented to said Columbia Trust Com-
[fol. 144] pany, as such Executor, that said stock was of small and constantly decreasing value, although in truth and in fact, as such defendants and said Brigham well knew, said stock was of a value of upwards of $2,000.00 per share and was constantly appreciating in value, that the fact that the Estate of Hermann Sielcken, who said defendants falsely and wrongfully asserted had been an alien enemy, owned the said 824 shares of stock which had theretofore been transferred into the name of said Trust Company as such Executor, had seriously injured and was progressively injuring the business of the defendant, The Woolson Spice Company, that such circumstances had seriously depreciated and was progressively depreciating the value of said stock, that an immediate sale was necessary to save the business from destruction, that orders were being cancelled daily, that unless an immediate sale were made the said stock could not be sold at all and that only a very small amount could then be realized through liquidation. Plaintiff is further informed and believes that the individual defendants and said Brigham well knew that the business of the defendant, The Woolson Spice Company, had not been injured and depreciated, but on the contrary was in a very prosperous condition, that the volume of said business had largely increased over the preceding year, that said Company had large contracts for furnishing coffee, spices and supplies to the armies of the United States, that unusual profits were anticipated, and that said stock had not depreciated in value, but on the contrary, would, as the individual defendants and said Brigham well knew, be largely increased in value so soon as the secret knowledge of such defendants and said Brigham as to the increased business and the prosperity of the defendant, The Woolson Spice Company, should become known to the public generally. Plaintiff is further informed and believes that said false and wrongful misrepresentations were

[fol. 145] intended to and did cause said Columbia Trust Company, as such Executor, which was unfamiliar with the affairs and business of said corporation, and which necessarily as a fiduciary stockholder of such corporation relied upon the reports, statements and representations of the defendants and said Brigham, who were the managing officers and directors of said corporation as aforesaid, as to the condition of its affairs, to believe that it would be impossible to secure a substantial price for the said stock, that said stock had greatly depreciated in value and was constantly depreciating in value, and that an immediate sale of said stock was necessary to avoid a total loss of said asset of the said estate. Plaintiff is further informed and believes that as a result of the aforesaid misrepresentations so relied upon the Executor was fraudulently induced to sell said stock to the individual defendants and said Brigham for a grossly inadequate price, as hereinafter more particularly set forth.

18. Plaintiff is informed and believes that in furtherance of said conspiracy the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, falsely and fraudulently represented to and advised The Columbia Trust Company that any publicity regarding a sale of said shares or any attempt to obtain purchasers for said shares, other than said individual defendants and said Brigham, would react disastrously on the business of said Woolson Spice Company and the value of said shares; that thereby said Columbia Trust Company, as such Executor, was misled and induced to refrain from calling said shares to the attention of other persons who might be interested therein as purchasers and to refrain from advertising the fact that said shares of stock were for sale, and was thereby misled into making a hurried sale of said shares to said defendants Koehrman, Biggs, Miller, [fol. 146] Frank D. Stranahan and Robert A. Stranahan and to said Brigham, without competition, publicity or adequate advertising in the press, for a grossly inadequate price; that said defendants and said Brigham, who were the directors and managing officers of The Woolson Spice Company, and the other individual defendants associated with them in said fraudulent conspiracy, took advantage of the peculiar knowledge of said officers as to the prosper-

ity of the defendant, The Woolson Spice Company, and the value of its stock, to acquire the shares of such fiduciary stockholder, The Columbia Trust Company, for a grossly inadequate price.

19. Plaintiff is informed and believes that in furtherance of said conspiracy the defendants, Koehrman and Biggs, and said Brigham conspiring among themselves and sundry other persons, falsely and fraudulently represented to and threatened The Columbia Trust Company that unless said shares were immediately sold to the individual defendants and said Brigham at a price fixed by them or if said shares were sold to any other person or persons, then they, the managing officers and directors of the defendant, The Woolson Spice Company, would forthwith leave the employ of said corporation and involve it in immediate disaster and ruin; that thereby said Columbia Trust Company, as such executor, was misled and wrongfully coerced into making a hasty sale of said shares to the said individual defendants and to said Brigham at a grossly inadequate price fixed by them and upon their own terms and without attempting to obtain bids from other possible purchasers.

20. Plaintiff is informed and believes that as part of and in furtherance of said conspiracy to acquire said shares at a grossly inadequate price, the defendants, Koehrman and Biggs, and said Brigham falsely and fraudulently mis- [fol. 147] represented the condition of said Company to other prospective purchasers of said stock and attempted to and did effectively fore*close* competition by such misrepresentation and by making threats to prospective purchasers that if such prospective purchasers competed with the individual defendants and said Brigham in the matter of the acquisition of said shares, then the management of the defendant, The Woolson Spice Company, would immediately quit and involve the corporation in chaos and ruin.

21. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy the defendants, Koehrman and Biggs, and said Brigham attempted to conceal from said Columbia Trust Company, and as officers and directors of defendant, The Woolson Spice Company, prevented said corporation from disclosing to The Columbia Trust Company the existence of an alleged claim in favor of the de-

fendant, The Woolson Spice Company, or that said corporation asserted an alleged claim against the estate of Hermann Sielcken in a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00). Plaintiff is further informed and believes that when prior to the said sale of said shares of The Woolson Spice Company to the individual defendants and said Brigham, The Columbia Trust Company, as such Executor, learned of the existence of said alleged claim from other sources, said individual defendants and said Brigham falsely and fraudulently represented to and assured The Columbia Trust Company that said alleged claim had little if any merit and that a recovery thereon, if any, would be of a negligible amount, although said individual defendants and said Brigham then believed they could and intended to take advantage of the [fol. 148] death of Hermann Sielcken, the circumstance that they were the sole survivors who had personal knowledge of many of the relations between the defendant, The Woolson Spice Company, and Hermann Sielcken in his life time, and their complete domination and control over the defendant, The Woolson Spice Company, its books, papers and records to enable said defendant, The Woolson Spice Company, through their connivance and assistance successfully to prosecute such alleged claim and recover from the estate of Hermann Sielcken a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00), and further falsely and fraudulently represented to and assured The Columbia Trust Company that neither they nor the defendant, The Woolson Spice Company, had any intention to assert said alleged claim against the estate of Hermann Sielcken, either presently or after the sale of said shares, although said individual defendants and said Brigham well knew that the defendant, The Woolson Spice Company, was at the time of such representations and assurances intending and planning to assert said claim as soon as the sale of said shares should be consummated, and although said individual defendants and said Brigham, as officers, directors, shareholders and prospective shareholders of defendant, The Woolson Spice Company, were at the time of making such representations and assurances intending to force and compel the defendant, The Woolson Spice Company, to assert said alleged claim as soon as the sale of

said shares should be consummated. Plaintiff is further informed and believes that the individual defendants and said Brigham, by means of such and sundry other false and deceitful representations, assurances and advices, misled, induced and wrongfully prevailed upon The Columbia Trust Company as such Executor, to make a hurried sale of such shares to the individual defendants and to said [fol. 149] Brigham without asking an adequate or thorough investigation of said alleged claim, or without judicially determining or settling the same. Plaintiff is further informed and believes that said individual defendants and said Brigham so attempted to conceal such alleged claim, so prevented The Woolson Spice Company from divulging the same, made such false representations and deceitful assurances and caused said corporation to delay asserting said alleged claim against the estate of said Herman Sielcken until after the consummation of said sale in order that the value of said shares might not thereby be increased because of the existence of said alleged claim or by the fruits thereof, should the same be settled or judicially determined prior to said sale. Plaintiff is further informed and believes that the defendant, The Woolson Spice Company, aided and abetted the individual defendants and said Brigham in consummating said conspiracy to purchase the aforesaid shares for a grossly inadequate price, actively participated therein and delayed asserting said alleged claim against the estate of Hermann Sielcken in order that the individual defendants and said Brigham might acquire the controlling interest in said corporation prior to the assertion of said alleged claim, in the expectation and with the purpose of thereby more effectively prosecuting said claim against the estate of said Hermann Sielcken. Plaintiff is further informed and believes that subsequent to the sale of said shares the said individual defendants and said Brigham caused the defendant, The Woolson Spice Company, to assert and the said corporation did assert the said claim against the said estate and instituted an action in the Supreme Court of the State of New York against said Columbia Trust Company as such Executor, to recover said amount, and that thereafter such proceedings were had in the said action that said Columbia

Trust Company, as such executor, settled and compromised [fol. 150] the said claim by the payment to the defendant, The Woolson Spice Company, of the sum of Two Hundred Eighty-four Thousand Six Hundred Eighty-nine and 16/100 Dollars ($284,689.16) from the funds of the estate, no part of which sum was taken into consideration on arriving at the value of said stock.

22. Plaintiff is informed and believes that, it being well known to said individual defendants and to said Brigham that certain loyal personal and business friends, associates and trusted advisers of the said Hermann Sielcken, including John Doyle, general counsel and former director of the defendant, The Woolson Spice Company, and Joseph Picksley, director and stockholder of The Woolson Spice Company, would exert their powers and influence to prevent a sale of said shares at the grossly inadequate price of approximately Six Hundred Eighty Dollars ($680.00) per share contemplated by said individual defendants and said Brigham and it being feared by said individual defendants and said Brigham that if said friends, associates and advisers of the said Hermann Sielcken were forewarned of said sale and said proposed price they might thwart said conspiracy by correctly informing the Columbia Trust Company as to the value of said shares and as to the existing and expected prosperity of The Woolson Spice Company, and by informing it of other persons who would be interested in purchasing said shares, the said individual defendants and said Brigham, in furtherance of said fraudulent plan to acquire said stock and conspiring among themselves and with sundry other persons, concealed from the said friends, associates and advisers of Hermann Sielcken the facts that said shares of stock were for sale and that they contemplated purchasing the same, the price which they planned to pay for said shares and all the details arranged in connection with said sale as hereinabove and hereinafter more specifically set forth, and by means of the aforesaid and sundry other false and deceitful misrepre- [fol. 151] sentations, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such executor, to conceal said facts, price and details from the said friends, associates and advisers of Hermann Sielcken.

23. Plaintiff is informed and believes that in consummation of said conspiracy the individual defendants and said Brigham, aided and abetted by sundry other persons, by means of the aforesaid false and deceitful misrepresentations, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such Executor, to enter into a private agreement to sell said shares to the individual defendants and to said Brigham at the grossly inadequate price of $680.00 per share, although, as said defendants and said Brigham well knew, the market value of said stock was approximately $2,000.00 per share.

24. That thereafter, as plaintiff is informed and believes, the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, coerced and misled the Executor into consenting to a pretended auction sale (at which in fact competitive bidding had been foreclosed as hereinafter set forth for the purpose of concealing the private contract of purchase of said shares of The Woolson Spice Company which said individual defendants and said Brigham had obtained through the fraud, deception and coercion practiced upon said Executor and to create an appearance that said sale rested upon a public auction in the hopes of foreclosing inquiry into the private contracts of sale so effectuated through the fraud of said individual defendants and said Brigham.

25. Plaintiff is informed and believes that shortly prior to the 24th day of July, 1918, said individual defendants and said Brigham were advised by The Columbia Trust [fol. 152] Company that said 824 shares and said 360 shares would be put up for sale at auction in the City of New York on July 24, 1918, that thereupon in furtherance of said conspiracy and for the purpose of chilling the bidding at said auction sale, said individual defendants, said Brigham and sundry other persons, each of whom was a prospective bidder for said shares, and all of whom were aided and abetted by sundry other persons, wrongfully and fraudulently agreed among themselves that one of their number, to-wit, the defendant, Marion M. Miller, would bid for and purchase said shares without competition from the other individual defendants and said Brigham and said other persons and that upon the acquisition of said shares by the said Marion M. Miller, the same should be divided among

said individual defendants, said Brigham and said other persons; that in compliance with said wrongful agreement the defendant, Marion M. Miller, attended said auction sale and purchased said shares without competition at a grossly inadequate price, said other individual defendants, said Brigham and other persons, in accordance with said agreement, refraining from bidding therefor, and that forthwith said shares were divided among the said conspirators as theretofore agreed upon.

26. Plaintiff is informed and believes that in order to further wrongfully chill the bidding at said auction sale said individual defendants and said Brigham conspiring among themselves and sundry other persons, by means of the aforesaid false and malicious -representations, assurances, advices, concealments and threats, induced The Columbia Trust Company, as such Executor, to refrain from making any extensive or adequate advertising of said auction and to make certain special arrangements and agreements with them as to the terms of said auction sale, to-wit, that said individual defendants, and said Brigham were to be permitted to make a deposit of $100,000.00 with The Columbia Trust Company as a down payment on said shares and were to be allowed thirty days after said [fol. 153] auction within which to pay the balance of their purchase price, whereas, the public and all other prospective purchasers were to be required to deposit 10% of their bids with the auctioneer at the time of the sale, and to pay the balance thereof to such auctioneer before one o'clock on the day following said sale.

27. Plaintiff is informed and believes that on or about the 24th day of July, 1918, said Columbia Trust Company, as such Executor, misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of said individual defendants and said Brigham, put up the said 824 shares and said 360 shares at auction in the City of New York, and, without adequate notice or advertisement of said sale, sold said 824 shares and said 360 shares without competition to the defendant, Marion M. Miller, on behalf of himself and said other individual defendants and said Brigham, at the terms theretofore agreed upon as aforesaid at the price of Six Hundred Eighty Dollars ($680.00) per share, although

the said individual defendants and said Brigham knew that the market value of said stock was approximately Two Thousand Dollars ($2,000.00) a share.

28. That thereafter the said Columbia Trust Company, as such Executor, still being misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of the individual defendants and said Brigham, caused to be presented to the defendant, The Woolson Spice Company, certificates for the said shares of stock, and said defendant, The Woolson Spice Company, with full knowledge that the transfer of said stock was the consummation of a gross fraud upon said Executor by the individual defendants and said Brigham, and with the expectation of deriving certain improper and unjustifiable benefits therefrom, as hereinbefore more [fol. 154] particularly set forth thereupon actively aided, abetted and participated in the consummation of said fraud and wrongfully and illegally transferred said stock into the names of the individual defendants and said Brigham and/or their nominees and caused certificates therefor to be issued and delivered accordingly.

29. Plaintiff is informed and believes that prior to the purchase of said shares as aforesaid and in furtherance of said conspiracy to acquire the same at a grossly inadequate price, the said individual defendants and said Brigham having insufficient means with which to effect said purchase without assistance, knowing full well that the defendant, The Woolson Spice Company, was in a position to make a large cash distribution by way of dividends and/or to borrow large sums from sundry financial institutions, and taking advantage of their peculiar knowledge of the condition and affairs of the defendant, The Woolson Spice Company, and of their control and domination over said corporate defendant as aforesaid, conspired and arranged with the defendant, The Woolson Spice Company, and sundry other persons that upon the consummation of the aforesaid sale the defendant, The Woolson Spice Company, would procure and advance and/or distribute to the individual defendants and to said Brigham sufficient funds with which to pay for said shares; that the aforesaid arrangement was concealed from The Columbia Trust Company as such executor, it being led to believe by the individual defendants and said

Brigham as aforesaid that the defendant, The Woolson Spice Company, was without excess assets and had a restricted and weak credit and that its prospective earning capacity was rapidly declining; that because of such concealments and misrepresentations The Columbia Trust Company, as such Executor, was induced to make said sale [fol. 155] as hereinabove set forth; that shortly after the sale of said shares as aforesaid and prior to the payment of the purchase price thereof, the defendant, The Woolson Spice Company, procured and distributed and/or advanced to the individual defendants and to said Brigham a sum or sums of money sufficient to pay the purchase price of said shares as theretofore arranged as aforesaid between the defendant, The Woolson Spice Company, and said individual defendants and said Brigham with the help and assistance of sundry other persons.

30. That since said issue and delivery of said certificates to said individual defendants and said Brigham and/or their nominees, the defendant The Woolson Spice Company has paid sundry dividends to said individual defendants, said Brigham, their nominees and transferees in stock and money, no part of which has been paid to the Executor of the estate of Hermann Sielcken or to any beneficiary of that estate; and that the plaintiff, as the residuary legatee and beneficiary of said estate, has been thereby deprived by the said fraud and wrongdoing of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, of the said 824 shares of stock and of the dividends declared and paid thereon, or of a large sum of money representing the fair market value of said stock and the amount or value of said dividends with interest from the date of payment.

31. That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date.

32. Plaintiff is ready, able and willing to pay to the defendants or any one of them, such sum or sums of money, if any, as this Court may determine is due and owing to any

[fol. 156] or all of the individual defendants or to the defendant administrators of the estate of said Brigham, by reason of the payment by them and said Brigham of the aforementioned sums as purchasers of said shares, or plaintiff is ready and willing to have this Court set off against any sum which it may determine to be due and owing to plaintiff or to the Irving Trust Company, as such Executor, by any of the defendants any sum which the said defendants or said Brigham may have paid as purchasers of said stock.

33. That the plaintiff is without adequate remedy at law.

Wherefore the plaintiff prays:

1. That the defendant, The Woolson Spice Company, be required to account to the plaintiff for the said 824 shares of its common capital stock or such shares as the said 824 shares of stock may represent in any recapitalization of said Company which may have occurred since the sale of said 824 shares and register the plaintiff, upon its books as the owner of said stock, and issue to her certificates for said shares of stock.

2. That in the event that The Woolson Spice Company does not have in its treasury or under its control sufficient shares of stock to enable it to issue to the plaintiff certificates for said shares of stock, that the Court require the defendant, The Woolson Spice Company, the individual defendants herein and said defendant administrators, Ammi F. Mitchell and Leroy E. Eastman to pay to said plaintiff the reasonable value of said shares of stock or the reasonable value of such shares of stock as may be represented by said 824 shares in any recapitalization of said corporation.

3. That the defendant, The Woolson Spice Company, the individual defendants and said defendant administrators be required by the decree of this court to account to the plaintiff for all dividends which have accumulated and/or been paid upon said 824 shares of stock since July 25, 1918, or [fol. 157] upon any stock represented by said 824 shares of stock in any recapitalization of said corporation, together with interest upon said dividends from the date of payment thereof.

4. That the individual defendants, said defendant administrators and each of them be required by order of this Court to produce and surrender for cancellation any certificates issued in their names or in the name of William G. Brigham for any of said 824 shares of stock or for any shares of stock represented by said 824 shares in said recapitalization of said corporation.

5. That the individual defendants, said defendant administrators and the defendant, The Woolson Spice Company, be enjoined, except under order of this Court first having been obtained, from transferring any of its shares of stock or from issuing certificates for further shares of stock and from changing in any way its present capital structure.

6. That the plaintiff have such other and further relief in the premises as the Court may deem meet and just.

(Signed) Baker, Hostetler, Sidlo & Patterson,
(Signed) Fraser, Hiett, Wall & Effler, Attorneys for the Plaintiff.

*Duly sworn to by Clara Sielcken-Schwarz. Jurat omitted in printing.*

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[fol. 158] In Court of Appeals of Lucas County, Ohio

Ex Parte C. N. Bevan

Writ of Habeas Corpus—Filed June 15, 1932

State of Ohio,
Lucas County, ss:

To Joseph Zimmerman, Sheriff of Lucas County, Ohio:

We command you that the body of C. N. Bevan, in your custody detained and restrained of his liberty, as it is said, you take and have before the Court of Appeals of Lucas County, Ohio, or before one of the judges of said court, at the courtroom of said court in the courthouse of said county, on the 15th day of June, 1932, at 9:30 A. M. o'clock, to do and receive what said court or said judge

shall then and there consider, concerning him in that behalf; and have you then and there this writ.

In witness whereof I, George E. Hardy, Clerk of said Court of Appeals, have hereunto set my hand and affixed the seal of said court this 14th day of June, 1932.

(Signed) Geo. E. Hardy, Clerk; by (Signed) M. E. Theuerkauff, Deputy Clerk.

Sheriff's Return

Received this writ June 14th, 1932, at 10:45 A. M., and, pursuant to its command, I do now have, this 15th day of June, 1932, at 9:30 A. M., the body of C. N. Bevan before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said C. N. Bevan in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by (Signed) Rolland Staggemeier, Deputy.

Costs: $.91.

[fol. 159] For the "writ and commitment papers" referred to in the foregoing Sheriff's Return, see the Order of Commitment attached as an exhibit to the pleading bearing the title "Petition for Writ of Habeas Corpus," filed in the Court of Appeals of Lucas County, Ohio on June 14, 1932, which Order of Commitment appears in full at pages 107 to 130, supra, of this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

The Sheriff's Return of service of said Order of Commitment, endorsed thereon, is as follows:

Sheriff's Return

Received this writ June 14, 8:30 A. M., and, pursuant to its command, I did arrest the within named C. N. Bevan June 14, 1932, 9:10 A. M., and produced him before the Court of Appeals, Lucas County, Ohio.

Joseph Zimmerman, Sheriff. Rolland Staggemeier, Deputy.

Costs: $.91.

[fol. 160] In Court of Appeals of Lucas County, Ohio

C. A. No. 2691

Ex Parte C. N. Bevan

Recognizance—Filed June 17, 1932

The State of Ohio,
Lucas County, ss:

Be it remembered that on June 14th, 1932, C. N. Bevan personally appeared before this court, and acknowledged himself to owe the State of Ohio the sum of One Hundred Dollars ($100.00), to be levied of his goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the above bound C. N. Bevan be and appear before this Court of Appeals, on the fifteenth day of June, 1932, and abide the judgment of this court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

(Signed) C. N. Bevan.

Taken and acknowledged before me on the day and year above written. George E. Hardy, Clerk of the Court of Appeals.

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[fol. 161] In Court of Appeals of Lucas County, Ohio

No. 2691

Ex Parte C. N. Bevan

Motion for New Trial—Filed June 22, 1932

Now comes the petitioner, C. N. Bevan, and moves the Court to vacate and set aside the findings and judgment of the Court herein, and for a new trial of this cause for the following reasons materially affecting the substantial rights of such petitioner:

(1) The Court erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) The Court erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of the Court are contrary to law.

(4) The finding, decision and judgment of the Court are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court are erroneous, in that there is no evidence to sustain them.

(6) The Court erred in not finding and adjudging that the order of commitment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) The Court erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no evidence attempted to be taken by said depositions, no questions asked of the petitioner, and no books, papers or documents which it was attempted to require him to produce could or would be relevant or material to any issue whatever under said alleged petition or in said alleged action, and that therefore the action of the notary public in ordering [fol. 162] petitioner to answer any questions or to produce any books, papers or documents, and the action of the Notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(8) The Court erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the

Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action, or to cause the taking of any depositions at all therein, or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that by reason thereof the action of said notary public in ordering petitioner to answer any questions or to produce any books, papers or documents, and the action of the notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio Constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(9) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio, and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

(10) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and

possessions against unreasonable searches and seizures shall not be violated."

[fol. 163] (11) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power upon notaries public.

(13) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

(14) The Court erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to attempt to force or require petitioner to answer any questions or produce any books, papers or documents upon the taking of said depositions or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of commitment against this petitioner.

(15) The Court erred in not finding and adjudging that said notary public in attempting to adjudge that any questions propounded to petitioner and any books, papers or documents ordered to be produced were material or relevant and in attempting to adjudge petitioner in contempt and issuing a commitment for him, attempted to exercise

judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio and that all of said acts of said notary were null and void.

(16) The Court erred in not finding and adjudging that William Purcell, the notary public purporting to act under said Sections 11510, 11511 and 11512, General Code of Ohio, and attempting to adjudicate that the questions asked of this petitioner which are referred to in the order of commitment issued and made by said notary, and the books, papers and documents which are also therein referred to, are material or relevant to any issue or issues in the case in which it was attempted to take said depositions, and attempting to adjudge the petitioner guilty of contempt and issuing said order of commitment and bringing about [fol. 164] the arrest and detention of this petitioner under said order of commitment, was disqualified on account of his personal pecuniary interest in the taking of said depositions, so to adjudge and act and to commit or cause this petitioner to be committed, by reason of the facts that said notary public was employed and paid by the plaintiff in said alleged pending suit, such alleged judgment and order of commitment being made at the request of said plaintiff, and that his employment was upon such terms that its extent and continuance and his continued compensation were contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and by such order of commitment, and that therefore said notary's acts in so adjudging and bringing about the petitioner's conviction and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and a denial of the rights of redress in courts and of a remedy by due course of law in violation of Section 16 of Article I of the Constitution of the State of Ohio and were null and void.

(17) The Court erred in not finding and adjudging that the attempted adjudication by the notary that any questions propounded to petitioner and any papers, books or documents ordered to be produced by him, are material to any issue in the case in which it was attempted to take said depositions, and the attempted adjudication that petitioner was in contempt, and the issuing of an order or commitment, all in the absence of the petitioner and with-

out notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I, and Section 1 of Article IV of the Ohio Constitution and each of said sections, and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States, and were null and void.

(18) The Court erred in not finding that the purported subpœna duces tecum issued by said notary was illegal and void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

(19) The Court erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions, was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna, require any questions to be answered or books, papers or documents to be produced, for the reason that no service of summons had been made on one of the defendants in said action, viz, Marion M. Miller, nor had any service been made on the defendant Irving Trust Company, in its capacity as Executor of the Estate of Herman Sielcken, deceased.

[fol. 165] (20) The Court erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) The Court erred in other respects apparent on the face of the record.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner.

[fol. 166] [File endorsement omitted]

IN COURT OF APPEALS OF LUCAS COUNTY

**Petitioner's Bill of Exceptions**

Filed June 23, 1932.
Notified: Waived.
Delivered to Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23, '32.
Received from Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23, '32.

[fol. 167] [Title omitted]

Appearances:

Messrs. Tracy, Chapman & Welles, by Messrs. George D. Welles and Harry S. Bugbee; Messrs. Marshall, Melhorn, Marlar & Martin, by Mr. Stuart S. Wall, for the petitioner.
Messrs. Fraser, Hiett, Wall & Effler, by Mr. Harold W. Fraser; Messrs. Baker, Hostetler, Sidlo & Patterson, by Mr. R. T. Jackson, for the respondent.

Be it remembered that on the trial of the above entitled action and proceedings in the Court of Appeals, Lucas County, Ohio, in the May Term of said Court, A. D. 1932, said trial beginning on the 15th day of June, A. D. 1932, before the Honorables Harry W. Lloyd, Silas S. Richards and Roy H. Williams, Judges of the said Court, the following proceedings were had, viz:

COLLOQUY

Mr. Welles: Mr. Stranahan, one of the petitioners was here and by consent of counsel he has been permitted to go subject to return on call. Before proceeding with this case we would like, if Your Honors please, to have leave to file in each of the three pending cases of Ex Parte Koehrman, Ex Parte Bevan and Ex Parte Stranahan leave to file amendments to the petition for writs of habeas corpus. We have given counsel on the other side copies of the proposed amendment.

Judge Lloyd: They may be filed.

Objection; exception.

Mr. Welles: We should direct the court's attention to the fact that there is, as we are informed, no return or answer from the sheriff at this time. We assume that before we proceed there should be.

Mr. Fraser: If your Honors please, the sheriff is here with the bodies of these men and with his return and I [fol. 168] understand the practice is to hand you the return when he hands you the bodies.

Mr. Welles: I may be in error, but I understand that the return constituted an answer which raised such issues, if any, of fact as the sheriff thought proper to raise and that the question of the propriety of the custody really is dependent upon the return made by the sheriff, showing whether or not he does have legal custody.

Judge Lloyd: Have you the returns here? Let's see them.

Deputy Sheriff Staggemeier: Here they are (handing returns to the court).

Mr. Fraser: The return in each case is accompanied by the original papers under which the sheriff is holding these men, as an exhibition to the court as to why he is holding them.

Judge Lloyd: I suppose we can go on with the hearing now.

Mr. Welles: May we see what the return says?

Judge Lloyd: Each is like the other. Here they are.

Mr. Welles: If your Honors please, in order to save time and get forward with this thing, we would like, with the court's permission, to save our objection to the return on the ground that it does not show any legal cause for the arrest or detention of any of the petitioners and without waiving that point we will proceed with the evidence, first making a statement. These three petitions for writs of habeas corpus arise by reason of writs issued by William Purcell, a notary public, in a case pending in the Court of Common Pleas of this county in which one Clara Sielcken Schwarz is the plaintiff and The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William A. Brigham, deceased, and The Irving

Trust Company, a foreign trust company, as executor of the estate of Herman Sielcken, deceased, are named as defendants. The petitioner Bevan was served with a subpœna duces tecum, which is attached to his petition and he appeared before the notary and answered certain questions and then, upon the advice of his counsel, declined to answer [fol. 169] certain questions. Counsel for the defendants appeared at that occasion for the sole purpose, as shown by the record, of protesting and objecting to the taking of depositions on various grounds which I will come to in a moment. Petitioners Robert A. Stranahan and Frank D. Stranahan, were served with writs of attachment. I should say the petitioners Robert A. Stranahan and John W. Koehrman were served with writs of attachment, requiring them to appear before the same notary public to give testimony and directing the sheriff to produce them for that purpose there. The petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company et al., is one in which the plaintiff alleges that she is residuary legatee of Herman Sielcken, deceased, and that The Irving Trust Company, a New York corporation, is the executor, still undischarged and acting under the will of Herman Sielcken, deceased. The petition attempts to charge a conspiracy alleged to have been devised and carried out in the years 1917 and 1918 by the defendants Koehrman, Biggs, Miller, the two Stranahans, and W. A. Brigham, deceased, represented by Mitchell and Eastman as administrators. It is also charged that The Woolson Spice Company was a co-conspirator with the individual defendants. The petition attempts to charge that a sale of stock of The Woolson Spice Company by The Irving Trust Company as executor to the individual defendants, or some of them, was brought about by fraudulent representations or misrepresentations. The plaintiff seeks to have the sale of the stock in the amount of 824 shares of the old stock of The Woolson Spice Company set aside. She requests that the existing stock of The Woolson Spice Company issued in lieu of that should be transferred to her, that the corporation should be required to do so and that she may have an accounting and that she may receive all dividends, disbursements of every kind, which have been made by The Woolson Spice Company to the owners of this stock from the year 1918 down to

the present time. The petition is very lengthy, it contains some twenty-eight pages, but the main point claimed and the main relief asked is as I have stated. The plaintiff seeks to excuse the long delay in the presentation of this claim and in the attempt to enforce it by an allegation to [fol. 170] this effect, it is paragraph 31 of the petition:

"That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date."

That is all that there is in the way of explanation or attempted explanation as to why this matter has been permitted to rest since 1918. As I have said, the theory of this petition is that there was a fraud, an actual fraud, committed by the defendants so attempted to be charged. But as your Honors will see when you come to examine the petition in the main case, nearly every allegation attempting to make any charge of wrongdoing I think, all except one, is made upon information and belief. The Irving Trust Company, it is alleged, upon demand having been made upon it to bring this suit as executor, declined to do so and the attempt is therefore made to make it a party defendant as executor. We expect the evidence here will show that the Irving Trust Company as executor is not in this case in any way. The Irving Trust Company itself has been permitted to do business here but the Irving Trust Company as executor of the estate of Herman Sielcken is not in this state or admitted to do business here. A demurrer has been filed in the Court of Common Pleas to this petition by one of the defendants, namely Franklin H. Biggs, the grounds of the demurrer are: first, that the plaintiff has not legal capacity to sue, and second, that the petition does not state facts which show a cause of action.

Judge Lloyd: When was that filed, how long ago was that?

Mr. Welles: It was filed on June 11, 1932.

Judge Lloyd: I was wondering why it had not been heard.

Mr. Welles: I may say if it is important, the evidence

here will be to the effect that we offered to have it heard immediately, prior to the going forward of these depositions or the attempt to go forward with them, and that counsel representing the plaintiff said they preferred to [fol. 171] have that demurrer heard in the usual and ordinary course. We filed a brief with the court with the number of points raised in the demurrer, and filed a copy of that with counsel for plaintiff. Then, third, that there is a misjoinder of parties defendant; fourth, that there is a defect of parties plaintiff; four-a, that there is a defect of parties defendant; fifth, that separate causes of action against several defendants are improperly joined; sixth, that the action was not brought within the time limit for the commencement of such an action, and seventh, that several causes of action are improperly joined. I may say we have been and are now ready to submit that demurrer to the Court of Common Pleas at any time, and have so advised counsel for plaintiff in the court below.

Judge Lloyd: Did counsel request oral argument? Unless the rule is changed, as soon as the demurrer is filed and briefs with it, the court goes ahead and decides it on its own initiative.

Mr. Welles: There has been no brief filed on behalf of plaintiff and their time has not expired, but in the meantime, as the evidence will show, an attempt was made to go forward with these depositions. Now, in addition to the fact that, if we are correct in our position on the demurrer, the plaintiff has no legal capacity to sue and that there is no cause of action stated and that therefore there can be no material or relevant evidence of any sort obtained from any witness, therefore no witness can be required to answer any question. It further appears that, or will appear, that the notary public issued for the petitioner Bevan, who is the secretary and treasurer of The Woolson Spice Company, a subpoena duces tecum of a character which, under the authorities as we understand, constitutes an unreasonable search and seizure and which does not comply with the rule that requires reasonable description and specification of papers which it is sought to have produced by such subpoena. An example of the requirements of the subpoena is "all contracts and copies of contracts at any time entered into by you", this is in the Koehrman sub-

[fol. 172] poena, "at any time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company"; and skipping through, for instance, No. 5 "All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, and/or its successors and/or any of its officers, agents, and directors, including George E. Warren and Willard V. King from 1916 to 1932 inclusive". Regardless of the subject matter of the correspondence it is all required to be produced. And another one, No. 8, "Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive," regardless of the subject matter of such correspondence, so that it seemed to us and we so advised Messrs. Koehrman and Bevan, Mr. Bevan's subpoena duces tecum was of a similar character, that under the law and the Constitution that they were not required to undertake to move their files bodily up to the law office of Messrs. Fraser, Hiett & Effler, and that the subpoena so far as it attempted to require the production of the papers was, in our opinion, void and until this court or some other court would otherwise rule they need not obey it. Now, as I say, the evidence will show that we appeared specially at the taking of the depositions of Mr. Bevan and saved all of our objections to the procedure, but he nevertheless did answer some questions. Certain questions he was advised he need not answer on the grounds which I have stated here, that the petition does not state a cause of action and plaintiff had no legal capacity to sue and the other grounds stated in the demurrer, that the subpoena duces tecum was illegal and void, and, accepting that advice, he declined to answer certain questions which, even if the petition did state a cause of action, I think under the rule laid down by this court in Poe v. Mathias, would be found to be wholly immaterial, and thereupon this order of commitment was issued. We think the evidence will show that the notary issued this order of commitment in the absence of the witness Bevan, in the absence of his counsel, without notice [fol. 173] to counsel or to Bevan, without opportunity to Bevan to be heard on the question as to whether he had committed a contempt or whether he was justified in re-

fusing to answer the questions and produce the books and the notary purported to adjudge, using that word, that Bevan was in contempt and purported to adjudge that the questions asked him were material, as shown by the commitment papers signed by the notary himself. It will, as your Honors have seen at this time be our contention that there has been a violation of the constitutional rights of these plaintiffs both under the state statutes, numerous sections of which we will point out in our argument, under the fourteenth section of the Constitution of the United States, an attempt on the part of the notary to exercise judicial power, and the evidence will show that the notary has necessarily a pecuniary interest in attempting to force these witnesses to testify before him, since he is acting not only as notary but as stenographer and will get certain fees and compensation for writing the transcripts, and therefore he is disqualified from undertaking to decide whether this man should be put in jail, under a decision of the United States Supreme Court in the Toomey case and other similar cases. Mr. Wall has reminded me that the evidence will also show that there has been no service of summons upon Marion M. Miller, one of the defendants, and that the attempted service of summons upon the Irving Trust Company as executor is void and ineffective as service against it as executor; that there has been no service of notice of the taking of these depositions upon the defendant Marion M. Miller and no real legal service of notice of the taking upon the Irving Trust Company as executor, and that, therefore, the case has not been placed in the posture required by the statutes for the taking of depositions, even though there were nothing else involved. I perhaps did indicate, but to make it clear, the opening statement is intended to apply to all three of the pending habeas corpus proceedings, Bevan, Stranahan and Koehrman, except in so far——

Judge Lloyd: I take it the questions involved are practically the same?

[fol. 174] Mr. Welles: Practically the same. There are one or two questions in the Bevan case arising by reason of the fact that some questions were asked him that do not arise in the Stranahan or Koehrman cases, otherwise the question is the same.

Mr. Fraser: Upon the last questions, if the court please, your Honors may want to consider this question, whether or not a witness who defies an order of a notary to appear and refuses to appear, and in answer to a subpœna appeared and refused to testify, anyway, whether that witness is in a position to raise these questions which Mr. Welles suggests. The only witness appearing was Mr. Bevan. Your Honors have observed from the statement of counsel this is a case involving a charge of an unlawful conspiracy entered into, secretly of course, by the defendants for the purpose of defrauding this estate. The petition is long in an attempt to set up the facts and after the statement of legal questions the facts are there and properly there under the authorities, we believe. We believe this plaintiff has a complete right and complete legal capacity to file and maintain this suit. How far your Honors will feel justified, in view of the decisions of this court, in examining into the technical sufficiency of this petition which is pending in the Court of Common Pleas and in which your Honors have no original jurisdiction to examine, will be discussed later as I have suggested. So far as the facts are concerned, on the sixth day of June a proper legal notice was served of the taking of depositions upon the thirteenth, was served upon counsel for these defendants who are now trying or appearing and who acknowledged service of that notice, and who appeared on the thirteenth with a witness Bevan. They were served with summons originally in the case on the second of June. Because of the fact that certain allegations in this petition for habeas corpus, the court should be advised that upon the original notice served and original subpœnas the defendants, in order to frustrate us in the taking of depositions, applied to the Common Pleas Court for an injunction, their main contention being, as I understand, they wanted time to prepare the case, on the sixth of June. On the sixth [fol. 175] of June an agreement was made, a verbal agreement, that the depositions would be taken on the thirteenth. Thereupon new notices were served on Monday, the sixth, acknowledged and on the seventh, after service of those notices the subpœnas were served on the defndants.

Judge Lloyd: Is this suit an action for damages or a suit in equity?

Mr. Fraser: Suit in equity, I rather think it is. It is a suit with alternative relief prayed for.

Judge Lloyd: If it is a suit in equity you could have a bill of discovery.

Mr. Fraser: That is doubtful under the Fairchild case. That case deals with the other question we have here, matter of materiality and matter of properly questioning—at any rate we have a legal right under the law, statutory right to take these depositions, and we think these gentlemen have no power to nullify that right. We think the court will be satisfied that these questions put to Mr. Bevan were material on the issues as presented in the petition. The subpœna duces tecum, to illustrate, we tried through Mr. Bevan, secretary and treasurer of the company, to produce the minute book. If that is not a correct description of the book, I don't know what is. He went on the stand and testified that he did have it but had turned it over to his counsel. Where it was now he didn't know. When he was on the stand we discovered that. Whether we will ever get the book, we don't know. We asked for the record of stock transfers, which are most material to this situation, this whole deal, as all these deals are, was concocted and carried out in the dark, with the lights all out, as these gentlemen always work, and work in secret, we wanted to find out what the minutes of this company showed, so I asked, we asked for the production of the minute book and it appears in the testimony of Bevan that there is one, but where it is we do not know, it was in his possession until the filing of this suit and he says it was [fol. 176] turned over to his counsel. We asked for the production of the record of the payment of dividends since this time when we say this stock was fraudulenty acquired and transferred. We asked for the record of the company showing the transfers of stock. It is obvious that this deal or transfer had been indirect and through many hands. That is the way those things are usually done, and we are entitled to know how. This man has testified that there are such records. In the subpœna duces tecum we only have to describe the document so the witness may know what is wanted and what is meant. If there is anything in the subpœna he doesn't know and can't ascertain the identity of, that can be taken care of when it is reached. In this examination of Mr. Bevan we tried to have him produce these

things designated, which are perfectly plain. No one can doubt their identity. He refused to produce them under the advice of counsel. We believe, if the court please, under the authorities this is the rule which your Honors will apply, that if there is any reasonable probability or possibility, as some of the courts say, these matters being material in this case, the court will not deny us the right to ascertain those facts, even though it does involve the cross examination of a defendant. The statute was passed for that purpose and as the Supreme Court has said in many cases, particularly in the Fairchild case, we can not be required to wait until they are satisfied the time has arrived for our finding out these facts. It is a valuable right given by the statute and we insist now it is two weeks after the filing of the petition. They have secured that much delay and we are entitled to proceed in the examination of these people and ascertain the facts and ascertain other evidence. Now, there is an allegation here for example, made in the supplement, that Mr. Purcell is not disinterested. No answer, I think is filed, and I understand it is not necessary to file an answer. That allegation of course we challenge. They make a challenge that our effort wasn't in good faith, to take testimony. That allegation is challenged, and proof will be offered. But if your Honors' practice is to exclude evidence challenging and disproving allegations of that kind, somebody must have the right to file an answer. The suit as filed here is not plaintiff and defendant, as may be done, it is filed ex parte John Smith, ex parte Koehrman, and the sheriff produces the body and the return and shows why he is holding these men. [fol. 177] Whether the sheriff has any right—he denies this charge of bad faith, he denies the officer was not authorized.

Mr. Welles: It is agreed in the Stranahan case that Mr. Robert A. Stranahan, the petitioner, would, if called as a witness, testify that he is in good health and that he expects to be present at the trial of this case if and when the case is tried on the merits.

Mr. Fraser: We make that stipulation notwithstanding the fact that on Monday Mr. Welles said Mr. Stranahan was ill and not feeling well.

Mr. Welles: As far as I know, that is the only thing we have been able to agree upon since this trial started.

Mr. Fraser: We can agree upon this, if the court please, that no service of summons has been made on Marion Miller. He is in California, and service here was residence service only and whether it was made, I don't know.

Judge Richards: Is he a necessary party?

Mr. Fraser: No.

Judge Richards: Is the Irving Trust Company?

A. No, I think not. But they have been served. Not only that, but have entered their appearance by acknowledgment of the deposition notice.

Mr. Wall: The sheriff's return on Miller shows "not found".

Mr. Fraser: Very well.

Mr. Welles: I understand you agree there has been no service on Marion Miller, either by summons or notice to take depositions?

Mr. Fraser: Yes, sir. And depositions when taken, we concede can not be used against the man who didn't have notice, but may be used against those served. These stipulations are made reserving our objections and exceptions to their materiality.

OFFERS IN EVIDENCE

Mr. Welles: Any offer of evidence as made by us is subject to our objection that there is not sufficient showing by answer or return from the sheriff showing legal custody of any of the petitioners. We do offer in evidence the petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company, and in order to avoid encumbering the [fol. 178] record further, if it is satisfactory, the copy attached to the amendments to the habeas corpus proceedings may be considered in evidence.

Mr. Fraser: It is also attached to the return of the sheriff. We do not object on the ground of identification

Judge Lloyd: You may have your exceptions.

Mr. Welles: Without objection as to lack of certification?

Mr. Fraser: Yes.

Mr. Welles: We offer copy of the demurrer filed by defendant Franklin H. Biggs in the case of Schwarz v. Woolson Spice Co.

Mr. Fraser: Note an objection on the ground of materiality.

Mr. Welles: And marked Plaintiff's Exhibit No. 2, the petition should be marked Exhibit No. 1. In the Bevan case we offer in evidence the copy of the commitment which is attached to the petition, and which may be marked Exhibit No. 3A. We also offer the copies of the writs of attachment which are respectively attached to the petitions in the Stranahan case and in the Koehrman case, and which are marked Exhibit- 3B and 3C respectively.

Mr. Fraser: The originals of those are likewise attached as a part of the sheriff's return of the writ of habeas corpus. Are those marked?

Mr. Welles: Those should be numbered in their own cases. We offer in evidence in each of the three cases Exhibit No. 3, which is a copy of the authority of the Irving Trust Company of New York to do business in the State of Ohio. If it is agreeable to counsel we will use a certified copy of it in one case and copies of that in the others.

Mr. Fraser: We are objecting to Exhibit No. 3 on the ground that The Irving Trust Company has already entered its appearance here.

(Overruled; exception.)

Mr. Welles: We also offer in evidence in each of the three cases Exhibit No. 4, which is a certified copy of the instrument filed by The Irving Trust Company with the secretary of state showing its authorized powers and the location of its office in this state and the name of its local representative, etc. We shall offer a certified copy in one case and copies of that in the others, if there is no objection.

[fol. 179] Mr. Fraser: Note our objection and exception.

Mr. Welles: We now offer in evidence in the Bevan case the subpœna duces tecum which was served on Mr. Bevan, marked "Plaintiff's Exhibit No. 7", in the Koehrman case the subpœna marked "Plaintiff's Exhibit No. 8", and in the Stranahan case the subpœna which was served on Mr. Stranahan, marked "Plaintiff's Exhibit No. 9", copies of each being attached to the original petitions for habeas corpus.

Mr. Fraser: Referring to the subpœnas served on the seventh of June?

Mr. Welles: Yes, the ones attached to the petition. No objection to the use of copies, is there?

Mr. Fraser: Not at all.

Mr. Welles: I would like to call Mr. Purcell the notary public.

Thereupon WILLIAM PURCELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welles:

Q. Your name is William Purcell?

A. Yes, sir.

Q. Live in Lucas county, Ohio?

A. Yes, sir.

Q. Notary Public of that county?

A. Yes, sir.

Q. You are the William Purcell who issued the writ of commitment for C. N. Bevan and writs of attachment for Robert Stranahan and Koehrman?

A. I am.

Q. In the case of Schwarz v. Woolson Spice Company?

A. Yes, sir.

Q. Were you employed by somebody to act as notary and take or attempt to take depositions?

A. Yes, sir.

Q. Who employed you?

A. The firm of Fraser, Hiett, Wall and Effler directly.

Q. The same firm who are of counsel for Clara Sielcken Schwarz in the case mentioned?

A. Yes, sir.

[fol. 180] Q. Is it a fact that you originally signed subpœnas for Mr. John W. Koehrman and Mr. C. N. Bevan and Mr. Stranahan, directing them to appear before you to give testimony and produce books and papers, at a time when no petition in the case of Clara Schwarz v. Spice Company had been filed?

(Objection.)

Mr. Fraser: The notice which they acknowledged was upon the sixth of June, there was an earlier notice served

on the day the case was filed, which was questioned before Judge Gosline on the sixth of June and at that time new notices were drawn and served.

Mr. Welles: I thought in view of some of the things Mr. Fraser had said about the history in the Court of Common Pleas——

Judge Lloyd: I don't think we are getting on——

Mr. Welles: Very well. Did you receive from anybody any acknowledgment or proof of service of notice of the taking of depositions before you set for June 13, 1932, in the cause of Schwarz v. Woolson Spice Company?

A. Yes sir.

Q. Do you have that with you?

A. No, sir.

Q. Do you have it there, Mr. Fraser?

Mr. Fraser: Yes.

Mr. Welles: May I see it. Now, Mr. Purcell, I show you a paper marked Plaintiff's Exhibit No. 6, is that the acknowledgment of service of notice of the taking of depositions just referred to by you?

A. Yes, sir.

Q. Have you any other acknowledgment of service of notice than that, referring to the June 13th proceedings?

A. No, sir.

Q. You have no return of service of notice of the taking of these depositions upon Irving Trust Company, executor?

A. None other except just this.

Q. Or upon Marion M. Miller?

A. No, sir.

Q. Neither one?

A. No sir.

Q. Have you any acknowledgment or proof of return or service of this notice or any notice upon Mitchell and Eastman?

(No answer.)

[fol. 181] Q. Mr. Purcell, I show you a copy of the subpœna duces tecum which is attached to the original petition for writ of habeas corpus filed by C. N. Bevan, is that a copy of the subpœna duces tecum issued by you for Mr. Bevan?

A. I can't tell, Mr. Welles.

Q. Have you produced the original Bevan subpœna signed by you?

A. It wasn't given to me, sir. It was introduced in evidence. It was referred to but not marked as an exhibit at the taking of the deposition.

Q. Was it left in your possession?

A. No, sir.

Q. I show you paper marked Exhibit No. 7, is that the original subpœna signed by you for Mr. Bevan?

A. Yes, sir.

Q. Dated the seventh of June?

A. Yes, sir.

Q. Did you prepare that subpœna, or did counsel for plaintiff prepare it?

A. Counsel prepared it.

Q. Counsel prepared it for you?

A. Yes, sir.

Q. I show you the commitment addressed to Joseph Zimmerman, sheriff, directing him to arrest and commit C. N. Bevan to the jail of Lucas county, being a paper which is attached to the sheriff's return in the Bevan case, did you sign that commitment?

A. Yes, sir.

Q. Did you give Mr. Bevan any notice before you signed it that you were going to sign it?

(Objection; overruled; exception.)

A. No, sir.

Q. Did you give counsel for Mr. Bevan any notice that you were to sign a commitment for Mr. Bevan?

(Objection; overruled; exception.)

A. Yes, sir.

Q. Isn't what you said this: that if a commitment was presented to you, you would sign it?

A. No, Mr. Welles, I believe I said that I was going to sign one but I didn't think I would get it into the hands of the sheriff before morning.

Q. You gave counsel for plaintiff no notice of the time and place when you were to sign the commitment?

A. Counsel for plaintiff?

[fol. 182] Q. Counsel for Bevan?

A. Not of the exact time.

Q. Nor of the place? Now, in your commitment appears the following:

"As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a notary public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a notary public, then and there for the said contempt of the said C. N. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the county jail until he submit to testify in the premises."

Now, isn't it a fact, Mr. Purcell, that at the time Mr. Bevan was present at the taking of his deposition, at the time he refused to answer questions, that you then and there adjudged that he was in contempt and ordered that he be committed?

(Objection; overruled.)

A. No, sir, I didn't at the exact moment.

Q. It was some hours later that you signed this commitment, wasn't it?

A. It was immediately at the conclusion of the taking of the depositions that commitments were decided upon and gotten up.

Q. It was some hours after Mr. Bevan had left the office before you signed this commitment?

A. Yes, sir.

Q. And you had no hearing, heard no arguments, received no evidence on the question as to whether Mr. Bevan was in contempt or whether he had any justification or reasonable ground for refusing to answer?

(Objection; overruled; exception.)

A. No, sir.

Q. You served upon Mr. Bevan no notice, either verbal or in writing, of any charge which you were making against him, before you signed this order for his commitment?

(Objection; overruled; exception.)

A. No, sir.

[fol. 183] Mr. Fraser: May I have objections and *objections*, without interrupting?

Judge Lloyd: Yes, you may.

Mr. Welles: Your commitment further reads:

"The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A."

Did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues?

A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case?

A. Yes, sir.

Q. Are you a lawyer?

A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case?

A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right?

A. Yes, sir.

Q. I show you paper marked Plaintiff's Exhibit No. 8, is that the original subpœna signed by you under date of June 7th for John W. Koehrman?

A. Yes, sir.

Q. It is a fact that because Mr. Koehrman did not appear before you on June 7th that you then signed and delivered to the sheriff a writ of attachment, the original of which appears as a part of the sheriff's return?

(Objection; overruled; exception.)

A. No, sir.

Q. At whose request did you sign the writ of attachment for Mr. Koehrman, which is a part of the sheriff's return.

A. At the request of Mr. Fraser.

Q. What was the reason for signing it?

A. Because he didn't appear on the thirteenth day of June.

[fol. 184] Q. Is it a fact, Mr. Purcell, that on the morning of June 13, 1932, after you had undertaken to begin these depositions, that I stated before you, as shown by your transcript, without waiving any rights or submitting themselves to the jurisdiction of the notary, Mr. Koehrman will come over here and meet with you gentlemen whenever you are through with Mr. Bevan, who is now here?

A. Yes, sir.

Q. And was there, to your knowledge, any request thereafter made that Mr. Koehrman should come over that afternoon?

A. There was a request made that I issue an order of attachment immediately for Mr. Koehrman.

Q. You issued the order of attachment immediately upon that statement being made?

A. At the conclusion of the depositions.

Q. You didn't issue it right that morning, then?

A. Yes, sir.

Q. You didn't issue it right that morning then?

A. Yes, sir. As soon as we took the recess until afternoon.

Q. You issued the attachment for Mr.——

A. I am sure the attachment was in the hands of the sheriff before eleven thirty a. m.

Q. As far as you know, no further request was made that Mr. Koehrman should come there, except as you undertook to enforce his attendance by this writ of attachment?

A. Yes, sir.

Q. Is this Exhibit No. 9 the subpœna which you issued for Robert A. Stranahan?

A. It is one of the subpœnas.

Q. That is the one dated June 7th?

A. Yes, sir.

Q. Is the writ of attachment which is attached to the sheriff's return and marked Plaintiff's Exhibit No. 10 in

the Stranahan case here, is it the one which you issued for the arrest of Mr. Stranahan?

A. Yes, sir.

Q. We offer in evidence each and all of the exhibits which have been called to the attention of Mr. Purcell, making an offer of each one separately.

(Objection; exception.)

Q. You were employed not only as a notary public but [fol. 185] also as a stenographer in the taking of these depositions of these three men whose petitions for habeas corpus are here, were you not?

A. Yes, sir.

Q. And you were acting as both notary and stenographer?

A. Yes, sir.

Q. Is it a fact that the amount of your compensation as a stenographer taking these depositions is dependent upon the number of pages of your notes which you transcribe and deliver to counsel for plaintiff?

A. Dependent upon the number of pages which we transcribe and deliver to all counsel.

Q. To any counsel, including counsel for the plaintiff?

A. Yes, sir.

Q. Do you receive any per diem as notary from counsel?

A. No, sir.

Q. Have no arrangement of that sort?

A. No, sir.

Q. Your compensation is contingent on the extent to which they testify before you?

A. Yes, sir.

Q. And the extent to which you transcribe the testimony, including the exhibits?

A. Yes, sir.

Q. And your employment as stenographer was by Messrs. Fraser, Hiett, Wall & Effler?

A. Yes, sir.

Q. In the taking of these depositions, I mean?

A. Yes, sir.

Q. What is your rate of compensation per page of typewritten transcripts of depositions or exhibits?

A. Based on the number of words. Twenty-five cents a hundred words, based on the statute.

Q. For the original copy?
A. Yes, sir.
Q. And you make a charge for furnishing carbons?
A. Yes, sir.
Q. What rate?
A. The party ordering the original pays for their carbon copy ten cents a folio and opposing counsel pays fifteen cents.
Q. Were you in fact directed by Mr. Fraser or one of his firm to prepare an original typewritten transcript of these depositions?
A. I was directed to transcribe the testimony.
[fol. 186] Q. In typewriting?
A. Yes, sir.
Q. And to deliver how many copies to his office?
A. Deliver one carbon to his office and one carbon to Mr. Jackson.
Q. What were you to do with the original?
A. The original I took it for granted is to be kept in my office until signed and filed.

Cross-examination.

By Mr. Fraser:

Q. Mr. Purcell, before this morning, at any time in the proceedings, was any objection made by counsel for these defendants to your competency or qualifications?
A. Not to me.
Q. In your hearing?
A. Not that I know of.
Q. At the time of the taking of the testimony was anything said by Mr. Welles or any of counsel for defendants in any way questioning your qualifications or fairness or ability?
A. No, sir.
Q. In addition to employment by us to transcribe this testimony, were you also employed by counsel for the defendants to furnish them certain copies?
A. Yes, sir.
Q. Has that been done?
A. Yes, sir.
Q. Except to be paid by them for these copies?
A. Yes, sir.

Q. Practice in the taking of depositions is this, is it not, a deposition is taken and certain fees are taxed for the taking of the original?

A. Yes, sir.

Q. And returned and taxed as costs in the case and in many instances the counsel calling you advance those costs to you?

A. Yes, sir.

Q. Has that been the universal practice?

A. Yes, sir.

Q. How long have you been engaged in this work.

A. Sixteen years.

Q. Before issuing any of these writs of arrest or commitment, did you or did you not consult one of the judges of the Common Pleas Court of this county?

A. Yes, sir.

[fol. 187] Q. Which judge?

A. Judge Gosline.

Q. Were the writs issued after consultation with him?

A. Yes, sir.

Q. At the time that you were shown and had knowledge, personal knowledge of the original deposition notice served upon and acknowledged by Tracy, Chapman & Welles, were you told by me that service was also being made upon the Irving Trust Company's agent in Toledo?

A. Yes, sir.

Q. Were you also told that the original notice would be in the mail the next day?

A. I don't recall that.

Q. You never have seen that original notice?

A. No, sir.

Q. Acknowledged by them?

[fol. 188] Redirect examination.

By Mr. Welles:

Q. You don't mean that you filed any formal application with the Court of Common Pleas for instructions or advice as to whether you should issue these writs of attachment or commitment?

A. No, sir.

Q. You didn't give counsel for defendant an opportunity to be heard and present any views they had as to why attachment or commitment should not issue?

A. No, sir.

Q. You simply went over and told Judge Gosline in substance that Mr. Fraser had asked you to issue writs of attachment or commitment or both and that because there was an application for injunction pending before him you wanted to find out whether it was all right to issue such writ?

A. In substance, that is it.

Q. He said, in substance, that the mere pendency of the application did not amount to one and you were at liberty to perform whatever your duties were in the premises?

A. Yes, sir.

Judge Williams: Was an attachment issued for the two witnesses who did not appear?

A. Yes, your Honor.

Q. And arrested under the writ of attachment?

A. Yes, your Honor.

Witness dismissed.

Mr. Welles: May it be conceded that Mr. Bevan, if called as a witness, would testify that he is in good health and expects to be present at the trial of the case of Clara Sielcken Schwarz v. The Woolson Spice Company in the Court of Common Pleas if and when it is tried, and resides in this county.

Mr. Fraser: Yes, I think he will testify to the same subject matter in his deposition, of course with our reservation of objection.

Mr. Welles: And the same thing as to Mr. Koehrman?

Mr. Fraser: Yes, with the same reservation.

Mr. Welles: We offer in evidence the several stipulations with respect to what the petitioners would testify to on these subjects.

[fol. 189] **Mr. Fraser: Mr. Welles, will you stipulate that the young man who served this notice would testify that it was served upon Mr. Dexter, the man who appears to be the authorized agent of the Irving Trust Company?**

Mr. Welles: You say you have a letter saying this was handed to Mr. Dexter?

Mr. Fraser: I have statement over the telephone that this was served upon Mr. Dexter and he signed it, placed his signature on there acknowledging service.

Mr. Welles: I think we ought to have him here.

Mr. Fraser: I will make my professional statement that as soon as we can we will call him, bring evidence to show that. Mr. Welles, you don't question the signature of your firm appearing upon the original notice?

Mr. Welles: No.

Mr. Fraser: Exhibit No. 6.

Mr. Welles: No:

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Thereupon Raymond T. Jackson, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. Your name, please?

A. Raymond T. Jackson.

Q. You are a lawyer, Mr. Jackson?

A. Yes, sir.

Q. Member of what firm?

A. Member of the firm of Baker, Hostetler, Sidlo & Patterson of Cleveland.

Q. Their offices in the Union Trust Building?

A. Yes, 1956 Union Trust Building, Cleveland, Ohio.

Q. Have you been active in the preparation and filing of this law suit?

A. I have.

Q. And did you take part in the preparation of the various notices and subpœnas for depositions in this case? [fol. 190] A. Well, I was in contact with the preparation and was asked to see that the notices be prepared. As far as our firm was concerned the work was physically done by Mr. Morley in cooperation with your office.

Q. Are you in a position to testify whether or not these depositions are being taken in good faith or in bad faith?

(Objection; overruled; exception.)

A. I am.

Q. What is the fact?

(Objection; overruled; exception.)

A. The depositions are being taken in good faith.

Q. What is the fact as to whether or not they will or will not be used in the trial of this Schwarz case?

(Objection; overruled; exceptions.)

A. Depositions are being taken with the intention that they shall be transcribed and filed in the Common Pleas Court of this county and that the depositions will be used by the plaintiff if any occasion under the statute should arise which will permit their use and if the witnesses, particularly those called for cross examination under the statute, testify to the truth.

Cross-examination.

By Mr. Welles:

Q. Mr. Jackson, it is a fact, is it not that the proposition has been made to you several times by counsel for certain of the defendants, including the three petitioners here, that you should agree that the demurrer in the Court of Common pleas should be first heard before a deposition should be taken, so that we might know whether there is any right on anybody's part to take anybody's deposition?

A. I don't know whether any proposition of that kind ex- [fol. 191] actly was made. I can state the facts as I understand them, if you want me to do it.

Q. I would like to have you state whether, in substance, the suggestion was not made that we should hear the demurrer before taking the depositions?

A. I will say this, that counsel for the defendants sought an agreement to postpone the taking of the depositions until——

Mr. Welles: I object to his rambling around here and go into an irrelevant controversy in which he can make this speech he is trying to make.

A. A suggestion was made.

Q. You say it was made, a suggestion was made by me to you?

A. Yes.

Q. And declined by you?

A. That is right.

Q. And is it not a fact that we stated to you that we were willing to submit that demurrer immediately, at any time suiting the court's convenience and your convenience?

A. You so stated yesterday to me, Mr. Welles.

Q. Didn't we say, so state, at the time we were before Judge Gosline that we were intending to file a demurrer which we would submit?

A. You stated you intended to file a demurrer before Judge Gosline on June 6th and that you would be glad to expedite the hearing of the motion when and if it should be filed.

Q. It is a fact, is it not Mr. Jackson, that you first attempted to take these depositions by means of serving with the summons a notice to take depositions?

A. Well, they were served the same day. My understanding is that the summons were served first, I wasn't there.

Q. But they were entrusted to the sheriff to be served at or about the same time?

A. My understanding is that after the summons had been issued in the suit and delivered to the sheriff of this county, he was then given notice of taking depositions and certain subpœnas and directed to serve them in a certain way, first [fol. 192] the summons and then the notices and then the subpœnas. I wasn't here but that is my understanding.

Q. They were to be served upon the defendants direct, not upon counsel?

A. That is right, no counsel had appeared for them Mr. Welles.

Q. And they were served with or at approximately the same time, the subpœna duces tecum, on the witnesses Bevan and Koehrman?

(Objection.)

Q. In order to shorten the thing, may it be admitted that the first attempt to take depositions in this case by plaintiff consisted of causing to be served upon certain of the defendants on the same day the summons was served upon

those defendants, a notice to take depositions, service being made upon the second of June and notice to take depositions for the sixth of June, and that upon Bevan and Koehrman there were served by the sheriff at or about the same time, at least on the same day, subpœnas duces tecum for the production of books and papers before the notary on June 6th.

Mr. Fraser: If that stipulation includes the service on the Irving Trust Company in substantially the same way, yes. I understand the order was first, service of summons upon the resident defendants, then notices to take depositions and in the instance of Mr. Bevan, who is not a defendant, he was served with a subpœna duces tecum after the summons on the defendants had been served and notices to take depositions. In Koehrman's, he was served first with summons, then with notice to take depositions, then with a subpœna duces tecum. This stipulation is made with the reservation.

Mr. Welles: There is no stipulation, then, because Mr. Fraser's additional language is quite contrary with what has been found in the Court of Common Pleas, and we can not agree with it. We will be glad to have the sheriff called and present the exact facts, but we do not think it is material.

[fol. 193] Judge Lloyd: And we agree with you.

Mr. Fraser: Mr. Jackson, referring to the cross examination with respect to any agreement made on June 6th with respect to hearing or taking depositions and filing and hearing of the demurrer, tell the court the substance of that talk?

(Objection; overruled; exception.)

A. On June 6th at the hearing before Judge Gosline it was suggested that the hearing of that pending motion be continued, and asked counsel if they could not agree on some method of going forward and in talking with Mr. Welles after the suggestion from Judge Gosline, I stated that we would be willing to postpone the consideration of the pending matter and go forward on the following Monday, June 13th, taking the depositions at Mr. Fraser's office that date having been suggested in conference by Judge Gosline. Mr. Welles asked for some time to confer

with someone and then told me that that date would be acceptable and that no objection would be made that any demurrer was pending if the one should be filed, or any exceptions taken to the taking of the depositions, and with that conversation we said we would issue the new subpœnas and notices which are the ones involved in this proceeding.

Motion to strike out answer as irrelevant, overruled, exception.

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[fol. 194] Thereupon GEORGE D. WELLES testified as follows:

Mr. Wall: Will you state the substance of the conversation between you and Mr. Jackson on June 6th, regarding the time of taking the depositions?

A. Judge Gosline suggested a recess, and then invited us into his room and suggested we agree upon some date for taking these depositions. He finally said it ought to go about a week, he thought. I told him and Mr. Jackson was present, that we would consider it and let him and Mr. Jackson know. We did consider and consult and my arrangement with Mr. Jackson was this. I said to Mr. Jackson, in substance, that obviously we must preserve any rights we had to object to these depositions, but whether there was a delay or whether there was not a delay, we would waive no rights, we were going to rely upon every right we had and expected to file a demurrer, and that we expected to rely upon the fact that there was a demurrer pending. Mr. Jackson said to me, in substance, "does that mean you will object to the witnesses testifying at all, that you won't let them testify at all on the ground you have a demurrer pending?" and I said we wouldn't waive that objection; but these two witnesses, Koehrman and Bevan will appear and will submit to answering some questions, what questions or how many I wouldn't now say, but we shall reserve all rights. I afterwards went back to Mr. Jackson, before we went, a moment or two afterwards, and said to him I didn't want any misunderstanding about this, "I want you to understand we will waive no objection that we have."

Mr. Fraser: My statement as to what occurred there is in the depositions and on file. I don't think it is at all material.

Mr. Welles: If Mr. Fraser's statement is considered, I want Mr. Wall's statement considered also, if it is to be material.

Thereupon the court recessed for the noon hour, to reconvene at 1:30 o'clock p. m.

Mr. Welles: With the court's permission we would like to [fol. 195] reopen our evidence for the purpose only of offering one New York Court of Appeals decision and a section of the New York statutes which we think bear upon the subject.

Judge Lloyd: Very well, you may put it in.

Mr. Fraser: Subject to our objection.

Mr. Welles: Your objection isn't because we are not proving the New York statute by some New York attorney?

Mr. Fraser: No.

Mr. Welles: We offer in evidence the opinion of the Court of Appeals of New York in the case of Harrington, Admr., etc., respondent, v. Eugene M. Keteltas et al., appellants, 92 New York, beginning at page 40 and ending on page 50, called Exhibit No. 11, and we also offer from the New York Civil Practice, Cahill, 1927, the following subsection 5 of Section 20 of the Surrogate's Court Act.

Mr. Fraser: Objection and exception.

Mr. Welles: You aren't objecting to the manner of proof?

Mr. Fraser: No.

Mr. Welles: "The Surrogate in or out of court as the case may be has power: 5. To require by order an executor, administrator, testamentary trustee or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute or by the surrogate's court under authority of the statutes."

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Thereupon Raymond Adamski, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser?

Q. What is your name, please?
A. Raymond Adamski.

Q. Where do you live?

A. 2601 Tate Avenue, Cleveland, Ohio.

Q. Are you employed somewhere?

A. Yes, sir.

Q. Where?

A. Law firm of Baker, Hostetler, Sidlo & Patterson.

[fol. 196] Q. What is your job?

A. Messenger.

Q. How long have you been there, how long have you worked there?

A. About a year and a half.

Q. Raymond, I show you paper which has been marked Defendants' Exhibit No. 1 in this case, did you ever see that?

A. Yes, sir.

Q. In connection with your work in Cleveland? Where did you first see it?

A. Mr. Morley handed it to me and told me to serve it on Mr. John Dexter.

Q. How many copies did he give you?

A. One original and one copy.

Q. Where did you go with them?

A. To the Society for Savings Bank Building.

Q. Whom did you inquire for?

A. I went to the guard at the Society for Savings Bank and asked for Mr. John Dexter. He told me there was a bank meeting and he would not be back until twelve, so I waited until about 12:15 and decided I would go to lunch and come back and catch him in, and I came back, I think it was about one o'clock, and I was just a few minutes late, he had gone out to lunch, and I went back and told Mr. Morley and said I would stop in and catch him on my way to court, and I went to his office then and the guard told me he was in and he pointed Mr. Dexter out to me and told me to go right over to him, so I went over to him and handed him the papers. At first I addressed him as Mr. Dexter, is this Mr. Dexter and he said yes and I handed him the papers. He looked them over and examined them and I told him to sign the copy and keep the original.

Q. Did he sign the copy?

A. Yes, sir.

Q. Did you see the name, J. H. Dexter, was that put on in your presence, Raymond?

A. Yes, sir.

Q. By whom was it signed?

A. By John H. Dexter.

Q. Was that all that occurred at that time?

A. Yes, sir.

Q. You left with him the original?

A. Yes, sir.

Q. And brought this with you and returned it to the office?

A. Yes, sir.

[fol. 197] Q. Since serving that paper, have you taken any steps to be more sure that it was Mr. Dexter who signed the paper?

A. Mr. Reeder took me down yesterday afternoon and introduced me to Mr. Dexter and it was the same man I served. He admitted it and said "are you the young man who served the papers?" and I said I was.

Witness dismissed.

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COLLOQUY

Mr. Fraser: There are three papers I wanted marked as exhibits. If your Honors please, I offer in evidence a copy of Exhibit No. 4, being the original summons and return of the sheriff of Cuyahoga county of service upon the Irving Trust Company. For the sake of the record, if one is to be made, we desire to substitute a copy. And Defendants' Exhibit No. 3, which is a certified copy of the annual report returned to the Tax Commission of Ohio by the Irving Trust Company for 1931, certified over the signature of the secretary.

(Objection; overruled; exception.)

Mr. Fraser: And defendants' Exhibit No. 2, which is a certified copy of the report rendered by the Irving Trust Company to the same body for the year 1932.

(Objection; overruled; exception.)

Mr. Welles: On the hearing yesterday, as I recall it, early in Mr. Purcell's examination I asked him in substance

whether it wasn't a fact that he had signed the first set of subpœnas for the witnesses before the petition had been filed or any summons served, that is those calling for their appearance on June 6, 1932, and the court at that time ruled that that was immaterial and I don't think I made an offer to prove. I should like to offer to prove that if permitted to answer he would say he signed these subpœnas before the petition was filed or summons issued.

Judge Lloyd: If I remember correctly, you stopped by saying you didn't think it was material and as I remember I said we agreed with you, and with that it was dropped. We want you to have in whatever you think you should have in here.

[fol. 198] Mr. Welles: Perhaps counsel can stipulate.

Mr. Fraser: Reserving our objection to the materiality, we stipulate that he would so testify.

Mr. Welles: And it is agreed that any evidence offered by either side in any one of the three cases shall be considered as having been offered in all three cases.

Mr. Fraser: Subject to the same objections.

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Plaintiff and defendant rest.

The foregoing, together with the exhibits hereto attached, namely, Plaintiff's Exhibits Nos. 1, 2, 3, 3a, 3b, 3c, 4, and 6 to 11, inclusive, and Defendants' Exhibits Nos. 1 to 4, inclusive, (no exhibit being numbered 5 and no exhibit number 5 being offered by either party or received in evidence) contains all the evidence given, offered or received by the court on the trial of the above-entitled action and proceedings.

Thereafter on the twenty-second day of June, 1932, the court found and adjudged in favor of the defendant and respondent, Joseph Zimmerman, as sheriff of Lucas county, and against the petitioner, and ordered the writ of habeas corpus issued herein discharged and the petitioner remanded to the custody of the respondent, to all of which petitioner in open court objected and excepted. Within three days thereafter petitioner filed in this court his written motion for a new trial of this cause, for the reasons therein set forth. Said motion having thereupon come on for hearing and having been argued and submitted to

the court, was overruled by the court; to which action and order of the court overruling his said motion, petitioner in open court, duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS

And now comes the petitioner, by his counsel, and presents to the court this, his bill of exceptions, taken at said trial of said cause, and prays that the same may be settled, allowed, signed and sealed by the court, and ordered made a part of the record in said cause; all of which is accordingly done on the twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges Court of Appeals.

[fol. 199] Received this bill of exceptions on this twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges Court of Appeals.

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[fol. 200] STATEMENT RE PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants), appears in full at pages 136 to 157, supra, in this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

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[fols. 201 & 202] PLAINTIFF'S EXHIBIT 2.

IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

DEMURRER OF THE DEFENDANT FRANKLIN H. BIGGS

Now comes the defendant Franklin H. Biggs and demurs to plaintiff's petition on the ground that it appears on its face:

1. That the plaintiff has not legal capacity to sue;

2. That the petition does not state facts which show a cause of action;

3. That there is a misjoinder of parties defendant;

4. That there is a defect of parties plaintiff;

4-a. That there is a defect of parties defendant;

5. That separate causes of action against defendants are improperly joined;

6. That the action was not brought within the time limited for the commencement of such actions;

7. That several causes of action are improperly joined.

Marshall, Melhorn, Marlar & Martin and Tracey, Chapman & Welles, Attorneys for Said Defendant.

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[fols. 203 & 204] PLAINTIFF'S EXHIBIT 3

"Certificates of qualification under Ohio General Code, Sections 178 and 183, issued to the Irving Trust Company by the Secretary of State of Ohio, March 28, 1930." Omitted in printing.

[fol. 205] PLAINTIFF'S EXHIBIT 3A

Plaintiff's Exhibit 3A (Order of Commitment of appellant, C. N. Bevan) appears in full at pages 107 to 130, supra, of this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

PLAINTIFF'S EXHIBIT 3B

(Notary's Writ of Attachment of Robert A. Stranahan.)

PLAINTIFF'S EXHIBIT 3C

(Notary's Writ of Attachment of John W. Koehrman.)

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[fols. 206-210] PLAINTIFF'S EXHIBIT 4

"Statements of Irving Trust Company, filed with Secretary of State of Ohio on March 28, 1930, under Ohio General Code Section 178 and 183." Omitted in printing.

[fol. 211] PLAINTIFF'S EXHIBIT 6

STATE OF OHIO,
Lucas County:

COURT OF COMMON PLEAS

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

Notice to Take Depositions

The defendants will take notice, that on Monday the 13th day of June, A. D. 1932, the plaintiff above named, will take the depositions of sundry witnesses to be used as evidence on the trial of the above cause, at the office of Fraser, Hiett, Wall and Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, between the hours of nine-thirty (9:30) o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

June 6, 1932. Dated June 6, 1932.

Fraser, Hiett, Wall & Effler, Attorneys for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said deposition may be taken, is hereby waived.

Tracy, Chapman & Welles, Attorneys for the Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan.

STATE OF OHIO,
County of Lucas, ss:

R. B. Swartzbaugh, being first duly sworn, says that on Monday, June 6, 1932, at about two thirty o'clock P. M., he served a copy of the within deposition notice upon Mr. Leroy Eastman, one of the Administrators of the Estate of William A. Brigham, deceased, and a member of the

law firm of Smith, Baker, Effler and Eastman, which firm are attorneys for Ammi F. Mitchell and Leroy Eastman, Administrators of the Estate of William A. Brigham, deceased.

[fol. 212] Mr. Eastman acknowledged service of notice verbally but declined to do so in writing, and declined to enter any appearance.

(Signed) R. B. Swartzbaugh.

Sworn to before me and subscribed in my presence this 7th day of June, 1932. (Signed) L. A. Wilhelm, Notary Public, Lucas County, Ohio. (Notarial Seal.)

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[fol. 213] PLAINTIFF'S EXHIBIT #7

Plaintiff's Exhibit #7 (Subpœna duces tecum served on appeliant, C. N. Bevan) appears in full at pages 104 to 106, supra, of this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

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PLAINTIFF'S EXHIBIT #8

(Subpœna duces tecum served on John W. Koehrman.)

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PLAINTIFF'S EXHIBIT #9

(Subpœna served on Robert A. Stranahan.)

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PLAINTIFF'S EXHIBIT #10

(Notary's writ of attachment of Robert A. Stranahan.)

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PLAINTIFF'S EXEIBIT #11

(Opinion of Court of Appeals of New York in case of George C. Harrington, Administrator, vs. Eugene M. Keteltas et al., 92 N. Y. 40.)

[fol. 214] DEFENDANT'S EXHIBIT 1

THE STATE OF OHIO,
Lucas County, ss:

IN THE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF LUCAS AND STATE OF OHIO

Case No. 131925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

against

THE WOOLSON SPICE COMPANY et al., Defendants

The defendant Irving Trust Company, Executor, will take notice, that on Monday, the 13th day of June, A. D., 1932, the above-named plaintiff will take the depositions of John W. Koehrman, C. N. Bevan, Robert A. Stranahan, Frank D. Stranahan and sundry witnesses to be used as evidence on the trial of the above entitled cause, at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, in the City of Toledo, County of Lucas and State of Ohio between the hours of 9:30 o'clock A. M. and 8 o'clock P. M., of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Baker, Hostetler, Sidlo & Patterson, Attorneys for Plaintiff.

I acknowledge service of the above notice, by copy, this 7th day of June, A. D. 1932.

J. H. Dexter, Agent for Defendant Irving Trust Company, Executor.

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[fols. 215-217] DEFENDANT'S EXHIBIT 2

"State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of the Irving Trust Company, New York City, New York." Omitted in printing.

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[fols. 218-220] DEFENDANT'S EXHIBIT 3

"State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York." Omitted in printing.

[fol. 221] DEFENDANT'S EXHIBIT 4

THE STATE OF OHIO,
Lucas County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify Irving Trust Company, a foreign corporation as executor of the last will and testament of Herman Sielcken, deceased, that it has been sued by Clara Sielcken-Schwarz in the Court of Common Pleas of Lucas County, and that unless it answer by the second day of July, 1932, the petition of said plaintiff against it filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered acordingly.

You will make due return of this summons on the thirteenth day of June, A. D. 1932.

Witness Geo. E. Hardy, clerk of our said court, and the seal thereof hereto affixed, at Toledo, this second day of June, A. D. 1932.

Geo. E. Hardy, Clerk. M. E. Theuerkauff, Deputy Clerk.

THE STATE OF OHIO,
Cuyahoga County, ss:

Received this writ June 2, 1932, and pursuant to its command, on the second day of June, 1932, at 2:20 p. m. I served the defendant, Irving Trust Company, a foreign corporation, as executor of the last will and testament of Herman Sielcken, deceased, by delivering to John H. Dexter, the duly authorized and designated managing agent of said defendant within this state, and the person duly authorized and designated as provided by law upon whom process against said corporate defendant may be served within this state, a copy of the summons with all endorsements thereon.

John M. Sulzmann, Sheriff. Jas. M. Gallagher, Deputy.

[fol. 222] In Court of Appeals of Lucas County, Ohio

C. A. No. 2691

Ex Parte C. N. Bevan

C. A. No. 2692

Ex Parte John W. Koehrman

C. A. No. 2693

Ex Parte Robert A. Stranahan

In Habeas Corpus

June 22nd, 1932.

Messrs. Tracy, Chapman & Welles and Messrs. Marshall, Melhorn, Marlar & Martin for petitioners.

Messrs. Fraser, Hiett, Wall & Effler and Messrs. Baker, Hostetler, Sidlo & Patterson for respondents.

Opinion

Williams, J.:

These actions, founded on applications for writs of habeas corpus, are brought to secure the discharge of certain witnesses who were committed by a notary public for refusing to appear and to produce certain books and for refusing to testify in the taking of depositions in an action for equitable relief brought by Clara Sielcken-Schwarz, plaintiff, against The Woolson Spice Company and other defendants in the court of common pleas of Lucas County, Ohio. The petition in that cause was filed June 2, 1932 and summons was issued and served upon all of the defendants except Marion A. Miller, who could not be found within the county. On the same day, notice of taking depositions on behalf of plaintiff was served upon the same defendants, but no depositions were taken under this notice. A new notice was served upon the same defendants on June 6th, 1932, for the taking of depositions on June 13, 1932. Subpœnas to appear and testify and produce certain books and records were served upon the petitioners Bevan and Koehrman, and a simple subpœna upon the petitioner Stranahan. Bevan appeared on June 13, 1932 and answered a few ques-

tions, but refused to answer others. He further refused to produce books and records described in his subpœna. Both Koehrman and Stranahan disobeyed the subpœnas and [fol. 223] failed to appear. For contempt in refusing to answer questions and in refusing to produce books, papers and documents, the notary public ordered that Bevan be imprisoned in the county jail until he should submit to testify, and he was held in custody under this order of the notary at the time he sued out the writ of habeas corpus. Attachments were issued for Koehrman and Stranahan and they were arrested and held thereunder at the time the writs of habeas corpus were sued out for their release.

Many reasons are presented why the petitioners should be discharged, and we will discuss these questions in their order.

In the first place it is contended that the questions asked the witness Bevan were not material. In the action brought in the court of common pleas the plaintiff charged certain of the defendants with conspiring to fraudulently acquire the stock of Herman Sielcken in The Woolson Spice Company at a price far below its true value by wrongfully ousting him as president during his temporary stay in Germany and unlawfully causing the stock to be sold. Many of the questions put to the witness Bevan, which he refused to answer, were proper and material, and well calculated to elicit testimony tending to prove the allegations of the petition, and the books and records required to be produced by the subpœna duces tecum served upon him would undoubtedly, if produced, have a material bearing on the matters under inquiry. This contention is therefore not well-founded.

It is also contended by petitioners that the petition filed in the common pleas court does not state a cause of action and the plaintiff does not have legal capacity to sue. As to the sufficiency of the petition, that is properly a question for the determination of the court in which the action is pending. However, in our judgment, depositions may be taken as a rule even though the petition does not state a cause of action, for it is not necessary that there should be an existing, as distinguished from a potential, issue of fact. It has even been held that they may be taken while error proceedings are pending in the reviewing court.

Fairchild v. Lake Shore Electric Railway Co., 101 Ohio St., [fol. 224] 261.

As to the legal capacity of plaintiff to sue, there are numerous authorities to the effect that where a personal representative of the decedent's estate refuses to bring an action for the collection of assets, an heir or devisee may bring the action and make the personal representative a party defendant.

24 C. J., 797, Sec. 1981;
11 R. C. L., 262, Sec. 297;
See annotations in 22 L. R. A., 458, and
20 Amer. & Eng. Anno. Cases, 96.

The subpœnas duces tecum did not require the production of private and privileged papers, so far as the evidence discloses, and were not so indefinite that the parties upon whom they were served were justified in entirely ignoring them, nor is it a justification for refusing to obey a subpœna or to give testimony that witnesses are in good health and expect to be present at the trial.

In re Berger, 13 Ohio App., 206; affirmed 101 Ohio St., 512;
14 Ohio Jurisprudence, 10, Sec. 5;
Mathias vs. Poe, 20 Court of Appeals Opinions, Sixth District, unreported, 276.

The evidence adduced on hearing in this court shows that the depositions were being taken in good faith and we cannot say that there was any ulterior motive or improper purpose in taking them. Section 11526, G. C., gives either party the right to commence taking testimony by deposition at any time after service upon the defendant, and this right has been recognized by our Supreme Court and no party should be deprived of it without good cause. In re Rauh, 65 Ohio St., 128.

The petitioners also make the novel contention that in attempting to punish for contempt the notary exercised judicial power in violation of Sec. 1 of Art. IV, Sec. 8 of Art. II and Section 32 of Art. II of the Constitution of Ohio, that Sections 11510, 11511 and 11512, G. C., are unconstitutional, if construed to give the notary power so to [fol. 225] adjudicate, that such attempted adjudication being made in the absence of the petitioner, without notice to him, or hearing, and without him being present or repre-

sented by counsel, or having opportunity to know of the charge against him, was in violation of the Constitution of Ohio and the 14th amendment to the Constitution of the United States, and that the notary public was disqualified to sit in judgment upon the petitioners by reason of his personal pecuniary interest. It is a complete answer to the contention so made by the petitioners that the notary public, in committing the witness to jail for refusing to answer questions and in issuing an attachment for the witnesses who refused to respond to subpœna, does not exercise judicial power.

De Camp vs. Archibald, 50 Ohio St., 618;
Benckenstein vs. Schott, 92 Ohio St., 29, 38.

Marion A. Miller was not served with process and is not a party to the suit, and may never be. In fact, there is no good reason why the cause may not be tried in the court of common pleas without obtaining service on Miller, as he does not seem to be a necessary party. However that may be, depositions may be used against parties who were served with notice and upon trial the depositions may be received against all defendants, if the one not receiving notice of the taking of them waives objection. Ryan vs. Conner, 40 Ohio St., 368.

At any rate, the plaintiff might properly proceed to take depositions, although Miller had not been served with notice.

Many of the questions raised would, if decided, require this court to anticipate decisions of the court of common pleas. Questions of the sufficiency of pleadings are, in the first instance at least, properly questions for the determination of the court in which the pleadings are filed. We cannot decide in advance questions made in the court in which the original action pends, and what has been said is by way of argument only.

[fol. 226] We have no hesitancy in reaching the conclusion that the contentions of the petitioners are not well-founded and that the petitions should be dismissed.

Petitions dismissed.

Lloyd and Richards, JJ., concur.

Approved:

Roy H. Williams, Judge. (Seal.)

[fol. 227] Certificate of Lodgment omitted in printing.

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[fol. 228] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 229] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed March 20, 1933

The appellant in the above entitled cause states that the points upon which he intends to rely in this court in this case are as follows:

1. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty or property, without due process of law".

2. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after [fol. 230] being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was committed by a notary public under said Sections 11510, 11511 and 11512 and erred in not holding that said Sections 11510, 11511 and 11512 construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth

Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property without due process of law".

3. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514 and each of them are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without con- [fol. 231] ferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

4. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is af- [fol. 232] forded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, Ohio, and in that in this case the notary public did not in fact give appellant any notice of any hearing, or afford to appellant an opportunity for him to be present at a hearing and defend in person or by counsel, before finding and adjudging appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, under which order appellant was wrongfully arrested and confined by the defendant in error (appellee).

5. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take

said depositions, and the attempted adjudication that appellant was in contempt, and the issuing of an order of commitment, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property, without due process of law".

[fol. 233] 6. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment of the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books, papers or documents.

7. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503, 11510, 11511, and 11512, and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they attempt to confer upon notaries public, who, under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them occurring in their presence, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

[fol. 234] 8. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operations of said sections and each of them as applied to the facts in this case do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the commitment and imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt for failing or refusing to give the evidence demanded and disqualified from ordering this appellant committed.

9. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's commitment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and to produce the books, papers and documents referred to in the order of commitment issued by said notary for this appellant and in finding and adjudging this appellant guilty of contempt and issuing said order of commitment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge by reason of the fact that said notary was selected, employed and paid by [fol. 235] the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms

that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of commitment, so that said notary public's acts in so adjudging and bringing about the appellant's commitment and detention were a denial of due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law".

10. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law".

Appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:


| [fol. 236] Title of paper | Record page |
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| 1. Return of Clerk of Supreme Court of Ohio | 1 |
| 2. Petition for Appeal | 2–4 |
| 3. Assignment of Errors | 6–13 |
| 4. Statement particularly disclosing Basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to Review the Judgment of the Supreme Court of Ohio | 15–21 |
| 5. Order allowing Appeal | 23–24 |
| 6. Citation and Acknowledgment of Service | 26 |
| 7. Stipulation as to Transcript of Record on Appeal | 28–32 |

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| 8. Statement to Respondent-Appellee re Paragraph 3, Rule 12, of the Supreme Court of the United States and acknowledgment of service | 34–35 |
| 9. Appellee's Statement making against the Jurisdiction asserted by Appellant | 37–59 |
| 10. Supersedeas and Appeal Bond | 61–62 |
| 11. Petition in Error in Supreme Court of Ohio | 63–69 |
| 12. Entry of Appearance in Supreme Court of Ohio | 70 |
| 13. Journal Entry substituting Sheriff | 71 |
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| 15. Order of Supreme Court of Ohio granting said Motion for Stay of Execution and advancement of cause | 77 |
| 16. Supersedeas Bond in Supreme Court of Ohio | 78 |
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| 21. Transcript of Journal Entries in Court of Appeals, Lucas County, Ohio | 98–100 |
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| 22. Petition for Writ of Habeas Corpus | 101–103 |
| 23. Subpœna Duces Tecum on C. N. Bevan | 104–106 |
| 24. Notary's Order of Commitment | 107–130 |
| 25. Amendment to Petition for Writ of Habeas Corpus | 131–135 |
| 26. Petition for Equitable Relief, in case Clara Sielcken Schwarz, plaintiff, v. The Woolson Spice Company et al., defendants, #131925, Common Pleas Court of Lucas County, Ohio | 136–157 |
| 27. Writ of Habeas Corpus and Sheriff's Return | 158 |
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| 29. Recognizance, filed in Court of Appeals of Lucas County, Ohio | 160 |
| 30. Motion for New Trial, filed in Court of Appeals of Lucas County, Ohio | 161–165 |
| 31. Bill of Exceptions | 166–199 |
| 32. Page containing reference to plaintiff's exhibit 1 (Petition for Equitable Relief) | 200 |
| 33. Demurrer of the defendant, Franklin H. Biggs | 201 |
| 34. Print only title of Plaintiff's Exhibit 3, as follows: "Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930" | 203 |
| 35. Page containing reference to Plaintiff's Exhibit 3-A (Notary's Order of Commitment) and Titles of Plaintiff's Exhibits 3-B and 3-C | 205 |
| 36. Print only title of Plaintiff's Exhibit 4 as follows: "Statements of Irving Trust Company, filed with Secretary of State of Ohio on March 28, 1930, under Ohio General Code Sections 178 and 183" | 206 |
| 37. Plaintiff's Exhibit 6 (Notice to take depositions and Proof of Service | 211–212 |
| 38. Page containing reference to Plaintiff's Exhibit 7 (Subpœna Duces Tecum on C. N. Bevan), and titles of Plaintiff's Exhibits 8 to 11 inclusive | 213 |
| 39. Defendant's Exhibit 1 (Notice to take depositions) | 214 |
| [fols. 238 & 239] | |
| 40. Print only title of Defendant's Exhibit 2, "State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York" | 215 |
| 41. Print only title of Defendant's Exhibit 3, "State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York" | 218 |
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| 43. Opinion of Court of Appeals of Lucas County, Ohio | 222–226 |
| 44. Certificate of Lodgment | 227 |
| 45. Authentication of Record | 228 |


Dated March 17, 1933.

Crary Davis, Geo. D. Welles, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

Acknowledgment of Service.

Due service, and receipt of copy, of the Appellant's foregoing Statement of Points to be relied upon and Designation of the parts of the record to be printed are acknowledged.

March 18th, 1933.

Newton D. Baker, Raymond T. Jackson, John C. Morley, Harold W. Fraser, Counsel for Appellee.

[fol. 240] [File endorsement omitted.]

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Endorsed on cover: File No. 37,481. Ohio Supreme Court. Term No. 784. Charles N. Bevan, appellant, vs. David M. Krieger, as Sheriff of Lucas County, Ohio. Filed March 16, 1933. File No. 37,481.

CLERK'S COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 785

JOHN W. KOEHRMAN, APPELLANT,

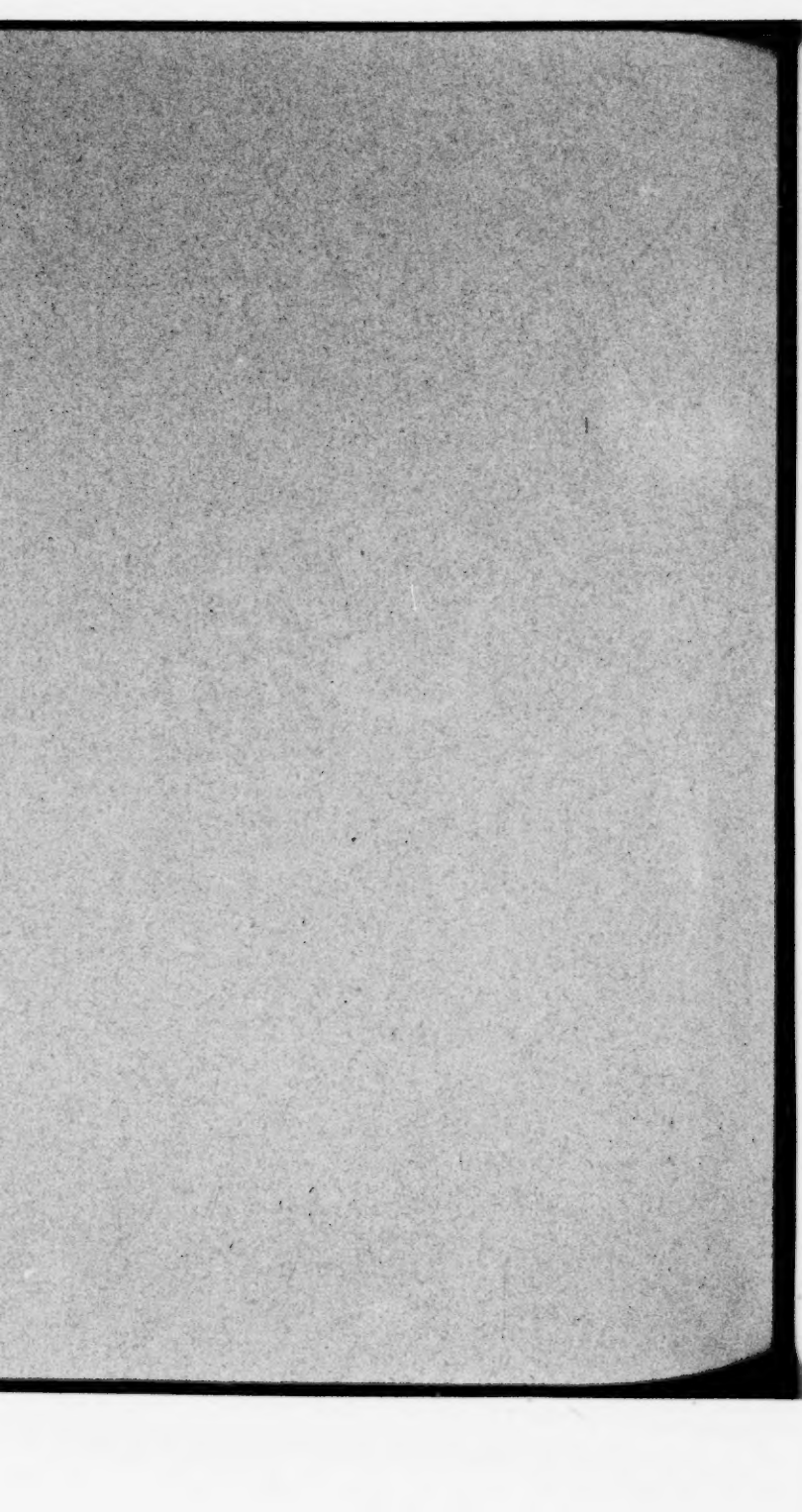
*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 16, 1933

(37,482)



# (37,482)

# PREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1932

# No. 785

JOHN W. KOEHRMAN, APPELLANT,

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PPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] Return of clerk omitted in printing

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[fol. 2] **IN SUPREME COURT OF OHIO**

No. 23653

Ex Parte JOHN W. KOEHRMAN, Plaintiff-in-error

PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO TO THE SUPREME COURT OF THE UNITED STATES—Filed Feb. 10, 1933

To the Chief Justice of the Supreme Court of Ohio:

The petitioner, John W. Koehrman, is the plaintiff-in-error in the above entitled case.

On the fourteenth day of June, 1932, petitioner commenced his suit in the Court of Appeals for Lucas County, Ohio, seeking his discharge from imprisonment by the Sheriff of Lucas County, Ohio, under an order of attachment issued by one William Purcell, a notary public, for an alleged contempt of said notary occurring during an attempt to take depositions before said Notary Public in a certain action, entitled "Clara Sielcken-Schwarz, Plaintiff, v. The Woolson Spice Company, et al., Defendants", numbered 131925 on the docket of the Common Pleas Court of Lucas County, Ohio. Final judgment was rendered against the petitioner by said Court of Appeals and by said judgment he was remanded to the custody of said Sheriff, the respondent herein.

After said judgment the petitioner filed his petition-in-error in this cause in the Supreme Court of Ohio, seeking a reversal of the said judgment of the said Court of Appeals; and, after hearing, the Supreme Court of Ohio, on January 25th, 1933, made and entered its final decision and judgment herein affirming the judgment of the said Court of Appeals.

The Supreme Court of Ohio is the highest court of the State of Ohio in which a decision could be had in said suit, and its said judgment is final.

In this suit there is drawn in question the validity of certain statutes of the State of Ohio, viz., Ohio General Code Sections 11510, 11511 and 11512, on the ground that they [fol. 3] and each of them, and the operation of said sections and each of them, as applied to the facts in this case deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

There is also drawn in question in this suit the validity of certain other statutes of the State of Ohio, viz. Ohio General Code Sections 11497, 11503 and 11514 on the ground that they and each of them and the operation of said sections and each of them, as applied to the facts in this case, likewise deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

Manifest error has occurred, to this petitioner's prejudice, as shown herein and in the assignment of errors filed herewith, in which are more fully set out the errors complained of.

In accordance with the Rules of the Supreme Court of the United States Rule 46, par. 2) the petitioner respectfully shows that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54; 28 U. S. C. A. Sec. 861 (a) ) was passed, viz., under 28 U. S. C. A. Section 344, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of Ohio to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of Ohio may be examined and reversed and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio, may be sent to the [fol. 4] Supreme Court of the United States, as provided

by law. Petitioner, desiring the appeal to be a supersedeas, also prays that an order be made fixing the amount of security which petitioner as appellant, shall give and furnish upon said appeal, and that upon the giving of said security, all further proceedings in this court be suspended and stayed, and the supersedeas granted by this court to the judgment of the Court of Appeals of Lucas County, Ohio, remain in force until the determination of said appeal by the Supreme Court of the United States.

George D. Welles, Crary Davis, Attorneys for Petitioner. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fol. 5] [File endorsement omitted.]

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[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 10, 1933

Plaintiff-in-error, John W. Koehrman, hereinafter referred to as appellant, in connection with and as a part of his petition for an appeal herein to the Supreme Court of the United States, assigns the following errors in the record and proceedings in this case upon which he will rely upon said appeal:

First. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals of Lucas County, Ohio, and in refusing to reverse the judgment of said court.

Second. The Supreme Court of Ohio erred in not finding and adjudging that this appellant was wrongfully and illegally imprisoned without due process of law, in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in not ordering appellant discharged.

Third. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them as applied to

the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

Fourth. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of [fol. 7] Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

Fifth. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was arrested and deprived of his liberty by order of a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no State "shall deprive any person of life, liberty, or property, without due process of law."

Sixth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514, and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law", in that (a) such sections as construed by [fol. 8] the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

Seventh. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no State

shall "deprive any person of life, liberty, or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might [fol. 9] commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

Eighth. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions that might be propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no State "shall deprive any person of life, liberty, or property, without due process of law".

Ninth. The Supreme Court of Ohio erred in not holding that appellant has, without due process of law and in vio-

lation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, been unlawfully deprived of his liberty in actual fact by reason of an order given by one of counsel for a party in a civil cause in the Court of Common Pleas of Lucas County, Ohio, to a notary public and carried into effect by such notary public, who had been employed by such counsel for the purpose of enabling such counsel to engage in an unreasonable search and seizure of books, papers and records in appellant's possession, and that by express direction of such counsel said unlawful commitment was made by said notary public without judicial hearing of any kind, [fol. 10] and that appellant was in fact deprived of his liberty by the acts and orders of such counsel, pretending to comply with the form of law through the use of the signature of said notary public on the order of attachment issued for and under which appellant was arrested and deprived of his liberty.

Tenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books, papers or documents.

Eleventh. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503, 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that

they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to attach and imprison a witness summarily as for alleged contempt of them; contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property, without due process of law."

[fol. 11] Twelfth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections, and each of them, as applied to the facts in this case, do not deny this appellant due process of law are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and the imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal, pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this appellant was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

Thirteenth. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment and detention had a direct, substantial, personal, pecuniary interest in taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and to produce the books, papers, and documents which appellant was ordered to produce and in finding and adjudg-

ing this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge or to cause appellant's attachment and detention by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of attachment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being [fol. 12] upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law."

Fourteenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

Fifteenth. The Supreme Court of Ohio erred in holding that the Court of Appeals of Lucas County, Ohio, likewise did not err in holding as stated in each of the foregoing assignments of error numbered second to fourteenth, inclusive.

Wherefore the petitioner prays that the said judgment of the Supreme Court of Ohio, dated January 25th, 1933, in the above entitled cause, be reversed and that judgment be rendered in his favor.

Dated February 10th, 1933.

George D. Welles, Crary Davis, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fols. 13-21] [File endorsement omitted.]

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[fol. 22] IN SUPREME COURT OF OHIO

No. 23653

EX PARTE JOHN W. KOEHRMAN, Plaintiff-in-error.

ORDER ALLOWING APPEAL—Filed Feb. 10, 1933

The plaintiff-in-error and appellant, John W. Koehrman, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Ohio on the 25th day of January, 1933, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and his statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment of the Supreme Court of Ohio, all pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date.

It is further ordered that said appellant shall give good and sufficient security in the sum of $1,000.00, that said appellant shall prosecute said appeal to effect and if said appellant fail to make his plea good, he shall answer all damages and costs; that upon the appellant's giving said security, the appeal shall operate as a supersedeas and stay [fol. 23] of execution and other proceedings under said judgment of the Supreme Court of Ohio pending such appeal and appellant shall be enlarged pending such appeal.

Dated February 10th, 1933.

Carl W. Wygantt, Chief Justice of the Supreme Court of Ohio. —— ——, Associate Justice of the Supreme Court of the United States.

[fol. 24] [File endorsement omitted.]

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[fols. 25 & 26] Citation, in usual form, showing service on David M. Krieger et al., filed February 15, 1933, omitted in printing.

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[fol. 27] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL—Filed March 3, 1933

It is hereby stipulated by and between counsel for the appellant, John W. Koehrman, and counsel for the appellee, David M. Krieger, as Sheriff of Lucas County, Ohio, that the Clerk of the Supreme Court of Ohio shall make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and shall include in such transcript of record the following and no other papers and exhibits:

1. Title page and caption;

2. Petition-in-error filed in the Supreme Court of Ohio on June 24, 1932, and Entry of Appearance by defendant-in-error, filed with the Clerk of the Supreme Court of Ohio, on June 25, 1932;

3. Transcript of Docket and Journal Entries in Court of Appeals, Lucas County, Ohio, filed with the Clerk of the Supreme Court of Ohio on July 23, 1932;

4. The pleading which bears title "Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County,

Ohio, on June 14, 1932, (which pleading appellant claims to be a petition for Writ of Habeas Corpus and appellee claims to be an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibits attached to said petition, said Exhibits being the Subpoena Duces Tecum upon this appellant, John W. Koehrman, and the writ of attachment of this appellant, John W. Koehrman.

5. The pleading bearing the title "Amendment to Petition for Writ of Habeas Corpus", filed in Court of Appeals, [fol. 28] Lucas County, Ohio, on June 15, 1932, (which pleading appellant claims to be an amendment to his Petition for a writ of Habeas Corpus and appellee claims to be an Amendment to an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibit A, attached thereto, which Exhibit A is the petition filed in the Court of Common Pleas, Lucas County, Ohio, in case entitled "Clara Sieleken Schwarz, New York plaintiff, v. The Woolson Spice Company, et al., defendants."

6. Writ bearing the title "Writ of Habeas Corpus" filed with the Clerk of said Court of Appeals, Lucas County, Ohio, on June 15, 1932, (which writ appellant claims to be a Writ of Habeas Corpus and appellee claims to be a Writ issued upon an Application for Discharge from Imprisonment under O. G. C. Sec. 11514), together with the Sheriff's Return thereto; the writ and attachment papers attached to said return to be shown only by incorporating, by reference, the order of attachment and subpœna duces tecum attached as exhibits to the Pleading (referred to in paragraph numbered 4 of this Stipulation) bearing the title of "Petition for Writ of Habeas Corpus"; the Sheriff's return to said order of attachment and the Notary's return of service of said subpœna to be here included in full;

7. Recognizance, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 17, 1932;

8. Motion for New Trial, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 22, 1932;

9. Bill of Exceptions, allowed by said Court of Appeals on June 23, 1932, and filed with the Clerk of the Supreme Court of Ohio on July 23, 1932; together with plaintiff's Exhibits 1, 2, 3, 3A, 3B, 3C, 4 and 6 to 11, inclusive, and defendant's Exhibits 1 to 4, inclusive. Of the foregoing exhibits, the following to be shown only by reference to the same papers in preceding pages of transcript, viz:

Plaintiff's Exhibit 1 (Petition in case of Clara Seilcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants) by incorporating, by reference, the same paper which is attached as Exhibit A to the Pleading (referred [fol.29] to in paragraph numbered 5 of this stipulation) bearing the title "Amendment to Petition for Writ of Habeas Corpus"; Plaintiff's Exhibit 3C (order of attachment of John W. Koehrman) and 8 (subpœna duces tecum on said John W. Koehrman) by incorporating, by reference, the same papers which are attached as Exhibits to the Pleading (referred to in paragraph numbered 4 of this stipulation) bearing the title "Petition for Writ of Habeas Corpus"; of the foregoing Exhibits the following to be indicated only by title as follows, viz: Plaintiff's Exhibit 3A (Notary's Order of Commitment for C. N. Bevan); Plaintiff's Exhibit 3B (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 7 (Subpœna Duces Tecum served upon C. N. Bevan); Plaintiff's Exhibit 9 (Subpœna served upon Robert A. Stranahan); Plaintiff's Exhibit 10 (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 11 (Opinion of the Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas, 92 N. Y. 40); of the foregoing Plaintiff's Exhibit 4 and Defendants' Exhibits 2 and 3 shall be abbreviated in accordance with the typewritten copies thereof submitted to you by counsel;

10. Opinion of the Court of Appeals of Lucas County, Ohio, in this cause;

11. Journal Entry filed in Supreme Court of Ohio on August 24, 1932, substituting Gilson D. Light, as Sheriff of Lucas County, Ohio, as defendant-in-error;

12. Motion for Stay of Execution and Advancement of Cause, filed in Supreme Court of Ohio, on October 15, 1932, and notice of hearing;

13. Order of Supreme Court of Ohio, entered on or about October 26, 1932, granting stay of execution;

14. Supersedeas bond filed in Supreme Court of Ohio on November 25, 1932;

15. Judgment of the Supreme Court of Ohio filed on January 25, 1933;

16. Opinion of Supreme Court of Ohio in this cause;

[fol. 30] 17. Order of Supreme Court of Ohio substituting David M. Krieger as Sheriff of Lucas County, Ohio, as defendant-in-error nunc pro tunc, filed February 10, 1933;

18. Appellant's petition for appeal, filed herein on February 10, 1933;

19. Appellant's assignment of errors, filed herein on February 10, 1933;

20. Appellant's statement as to the basis on which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the said judgment of the Supreme Court of Ohio, filed herein on February 10, 1933;

21. Order allowing appeal and supersedeas, filed herein on February 10, 1933;

22. Appeal and supersedeas bond approved and filed herein on February 17, 1933;

23. Statement to respondent-appellee (defendant-in-error in the Supreme Court of Ohio) re Paragraph 3, Rule 12, of the Supreme Court of the United States, and acknowledgment of service thereof, filed herein on February 10, 1933;

24. Citation upon appeal and proof of service, filed herein on February 16, 1933;

25. Stipulation as to Transcript of Record on Appeal;

26. Appellee's Statement making against the jurisdiction asserted by the appellant, filed herein on February 24, 1933;

27. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 22nd day of March, 1933, pursuant to the order allowing said appeal.

[fol. 31] It is further stipulated by and between the parties that the foregoing items constitute all portions of the record necessary for a determination of the questions raised on this appeal and that no portion of the record omitted is necessary or material for a determination of such questions.

Dated March 2, 1933.

Geo. D. Welles, Cramp Davis, Attorneys for Appellant. Stuart Chase, H. S. Bugbee, Thomas J. Lynch, of Counsel. Baxter, Hostetler, Sidlo & Patterson, Fraser, Hett, Wall & Eppler, Attorneys for Appellee, Newton D. Baker, Harold W. Fraser, Raymond T. Jackson, John C. Morley, of Counsel.

[fols. 32-59 ] [File endorsement omitted.]

[fols. 60 & 61] Supersedeas bond on appeal for $1,000, approved and filed February 17, 1933, omitted in printing.

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[fol. 62] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed June 24, 1932

John W. Koehrman, plaintiff-in-error (hereinafter referred to as the petitioner) says that at the May Term, 1932, of the Court of Appeals of Lucas County, Ohio, on June —, 1932, in an action for a writ of habeas corpus which originated and was therein pending, being Cause No. 2692, entitled "Ex Parte, John W. Koehrman", and in which plaintiff-in-error was petitioner and Joseph Zimmerman, as Sheriff of Lucas County, Ohio, was respondent, a judgment was rendered against the petitioner.

Said case originated in said Court of Appeals and involved questions arising under the Constitution of the United States and the Constitution of Ohio.

A transcript of the docket and journal entries and the original papers in said court are filed herewith.

There is substantial error in said record, proceedings and judgment, to the manifest prejudice of petitioner, in the following and other respects:

(1) Said Court of Appeals erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) Said Court of Appeals erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of said Court of Appeals are contrary to law.

[fol. 63] (4) The finding, decision and judgment of said Court of Appeals are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court of Appeals are erroneous, in that there is no evidence to sustain them.

(6) Said Court of Appeals erred in not finding and adjudging that the order of attachment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio; entitled Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give and no books, papers or documents which petitioner could produce would be relevant or material to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(8) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that therefore the action of the notary public in attempting to adjudge that peti- [fol. 64] tioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in

this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

(10) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated."

(11) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

[fol. 65] (12) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio, in that they attempt to confer judicial power on notaries public.

(13) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such

sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and were null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) Said Court of Appeals erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require petitioner to attend as a witness or to produce any books, papers or documents or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) Said Court of Appeals erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) Said Court of Appeals erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of [fol. 66] contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due

process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and were null and void.

(17) Said Court of Appeals erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States and were null and void.

(18) Said Court of Appeals erred in not finding that the purported subpœna duces tecum issued by said notary was illegal and void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

[fol. 67] (19) Said Court of Appeals erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(20) Said Court of Appeals erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing

or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) Said Court of Appeals erred in other respects apparent on the face of the record.

(22) Said Caurt of Appeals erred in overruling petitioner's motion for a new trial.

Wherefore petitioner prays that said judgment in the Court of Appeals be reversed and that he be restored to all things lost thereby.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-Error.

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[fol. 68] IN SUPREME COURT OF OHIO

[Title omitted]

ENTRY OF APPEARANCE—Filed June 25, 1932

The undersigned defendant-in-errror and respondent waives the issuance and service of summons-in-error and enters his appearance herein.

Joseph Zimmerman, as Sheriff of Lucas County, Ohio. Fraser, Hiett, Wall & Effler, Counsel of Record for the Respondent in Court of Appeals.

6/24/32.

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[fol. 69] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed August 24, 1932

Upon the suggestion by counsel for the petitioner, and it appearing to the court, that during the pendency of these proceedings-in-error the respondent and defendant-in-error, Joseph Zimmerman, has ceased to be Sheriff of Lucas County, Ohio, and that Gilson D. Light has succeeded said Zimmerman in said office and is now the Sheriff of Lucas

County, Ohio, and with the consent of all parties, including said Gilson D. Light,

It is ordered and adjudged:

That said Gilson D. Light, as Sheriff of Lucas County, Ohio, is substituted as respondent and defendant-in-error herein in place of said Joseph Zimmerman, and that these proceedings-in-error proceed under their original title.

Approved.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner-Plaintiff-in-error. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Respondent-Defendant-in-error.

O. K. Gilson D. Light.

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[fol. 70] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE —Filed October 15, 1932

Now comes plaintiff-in-error, J. W. Koehrman, and moves the court for an order staying execution of the final judgment of the Court of Appeals of Lucas County, Ohio, to reverse which this proceeding-in-error is being prosecuted, until this proceeding-in-error shall have been heard and decided by this court, and to fix the terms of such stay of execution.

Plaintiff-in-error further moves the court that, in the event his motion for a stay of execution be not granted, this cause be advanced for hearing and decision by this court on a date prior to the 25th day of October, 1932.

The foregoing motion for stay of execution is made upon the grounds that the present proceeding, which is in habeas corpus, presents substantial and important questions for determination,

(a) As to the construction of Sections 11510, 11511 and 11512, General Code, and their constitutionality both in respect to the Constitution of the State of Ohio and the Fourteenth Amendment to the Constitution of the United States;

(b) As to the disqualification of the Notary Public to issue the orders of commitment and attachment;

(c) As to whether any evidence is or could be relevant or material, or the giving of it enforced at the instance of the plaintiff in an action which the plaintiff has no right or capacity to maintain and in which her petition states no cause of action;

(d) As to whether the plaintiff in said action, in the Common Pleas Court of Lucas County, Ohio, has any right or capacity to maintain said action and whether her petition states any cause of action, which questions are raised in said Common Pleas Court by a demurrer filed by one [fols. 71-74] of the defendants in said action, which demurrer is pending and set for hearing on October 27, 1932;

(e) Other and related questions, shown by the brief of plaintiff-in-error, which questions are of general interest and importance; and upon the further grounds appearing in the attached affidavit of plaintiff-in-error in support hereof.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

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[fol. 75] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER GRANTING MOTION BY PLAINTIFF IN ERROR FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Oct. 26, 1932

It is ordered by the Court that this motion be, and the same hereby is, allowed.

Journal 33, page 29.

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[fol. 76] Supersedeas bond on stay for $100.00, approved and filed November 25, 1932, omitted in printing.

[fol. 77] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY A. D. 1933

No. 23653

Ex Parte JOHN W. KOEHRMAN

Error to the Court of Appeals of Lucas County

JUDGMENT—Jan. 25, 1933

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered that a special Mandate be sent to the Court of Appeals of Lucas County, to carry this judgment into execution.

Journal 33, page 90.

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[fol. 78] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed February 10, 1933

Upon the suggestion by counsel for the plaintiff-in-error, and it appearing to the Court, that during the pendency of these proceedings in error, viz., on January 1, 1933, defendant-in-error, Gilson D. Light, ceased to be Sheriff of Lucas County, Ohio, and that David M. Krieger has succeeded said Light in said office and is now Sheriff of Lucas County, Ohio.

It is ordered and adjudged:

That said David M. Krieger, as Sheriff of Lucas County, Ohio, is substituted nunc pro tunc as defendant-in-error herein in place of said Gilson D. Light.

Carl V. Weygandt, C. J.

[fol. 79] IN SUPREME COURT OF OHIO

Ex Parte BEVAN

Ex Parte KOEHRMAN

Ex Parte STRANAHAN

Evidence—Depositions—Judicial power not exercised by notary public committing witness for contempt—Constitutional law—Sections 11510, 11511 and 11512, General Code—Due process of law—Committed witness afforded statutory remedy—Section 11514, General Code—Relevancy or competency of testimony and privilege preserved in trial court—Right to cross-examine adverse party vests when summons served—Sections 11497 and 11526, General Code—Cross-examination authorized, although codefendant not served—Codefendant may be served, how—Section 11299, General Code—Infirmity of petition or action not ground for refusal to respond—Notary public not disqualified for interest in taking depositions—Subpœna duces tecum not unreasonable search and seizure—Entire corporate correspondence file, records and documents ordered produced—Collection of assets of corporation—Heir or legatee may maintain action, upon refusal of personal representative.

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination

under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

[fol. 80] 5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpœnas duces tecum, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

Nos. 23652, 23653 and 23654

Decided January 25, 1933

Error to the Court of Appeals of Lucas County

OPINION

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases.

An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error C. N. Bevan was held under a commitment issued by a notary [fol. 81] public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpœna duces tecum, in the course of the taking of his deposition in the suit of Clara Sielcken-Schwarz v. The Woolson Spice Company et al., pending in the common pleas court of Lucas county. The plaintiffs in error John W. Koehrman and Robert A. Stranahan had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpœnas personally served upon them.

The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error John W. Koehrmann and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrmann and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in as- [fol. 82] sociation with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the common pleas defendants, and subpœnas duces tecum were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because

prior to June 6th counsel for the common pleas plaintiff were served with a motion to quash the notice to take depositions and the subpœnas duces tecum, and to enjoin the [fol. 83] taking of depositions. This motion came on for hearing before the common pleas court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court, an agreement was reached between counsel for the common pleas plaintiff and chief counsel for the common pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the common pleas defendants, subpœnas duces tecum upon the plaintiffs in error Bevan and Koehrman, and ordinary subpœnas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a. m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpœna. The witnesses Koehrman and Stranahan disregarded their subpœnas and failed to appear. On the failure of three of the witnesses summoned to appear, and the failure of the witness, Bevan, to make any compliance with his subpœna duces tecum, the notary adjourned the hearing until 2 p. m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpœna. Prior to this adjourned time for the taking of these depositions a supplemental motion to quash the new notices and subpœnas, and to enjoin the taking of depositions in the common pleas suit was filed in the common pleas court. At 2 p. m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only [fol. 84] reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpœna duces tecum. Finally Bevan stated that he would answer no further

questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpœna duces tecum.

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in obedience to their subpœnas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a. m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of habeas corpus were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and common [fol. 85] pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the Court of Ap-

peals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the common pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpœnas duces tecum called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpœnas.

On June 22d the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on [fol. 86] June 29th these applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson and Messrs. Fraser, Hiett, Wall & Effler for defendant in error.

STEPHENSON, J.:

These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpœna, and Bevan and Koehrman were served with subpœnas duces tecum.

No complaint is made as to the service of the subpœnas. It is contended that the subpœnas duces tecum "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case, it is significant that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpœnas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpœna duces tecum, giving as his reason [fol. 87] therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of habeas corpus, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. Bevan v. Light, Sheriff (C. C. A.), 61 F. (2d) 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for

taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the Governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to [fol. 88] perform the duties of the office, or ascertain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine," and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to

an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that [fol. 89] a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpœna or for refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. [fol. 90] Notices are regularly served to take depositions of the officers of an adversary corporation. Subpœnas are regularly served. One officer appears in obedience to his

subpœna, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of competent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpœnas duces tecum did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpœnas as unreasonably com-[fol. 91] prehensive, or that they constitute unlawful search and seizure.

Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals

which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N. S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpœnas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing [fol. 92] relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpœna, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: De Camp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.
Weygandt, C. J., and Kinkade, J., not participating.

[fol. 93] Reporter's certificate to foregoing paper omitted in printing.

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[fol. 94] In Court of Appeals of Lucas County

Appearance Docket No. 6, Page 192

C. A. No. 2692

Ex Parte John W. Koehrman

Marshall, Melhorn, Marlar & Martin; Tracy, Chapman & Welles.

Docket Entries—Filed in Supreme Court of Ohio July 23, 1932

1932.

June 14. Petition for Writ of Habeas Corpus filed.

June 14. Writ of Habeas Corpus granted. Bond fixed at $100.00. Jour. 7-276.

June 14. Præcipe filed. Writ of Habeas issued and delivered Sheriff.

June 15. Writ of Habeas Corpus filed endorsed as follows, viz: Received this writ June 14, 1932 at 10:45 a. m. and pursuant to its command I do now have this 15th day of June, 1932 at 9:30 a. m. the body of John W. Koehrman before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said John W. Koehrman in custody arises from and is because of a writ and commitment

papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by Rolland Staggemeier, Deputy. .91.

June 15. Amendment to Petition for Writ of Habeas Corpus filed.

June 17. Recognizance filed.

June 22. Petition of Petitioner dismissed. Petitioner John W. Koehrman remanded to custody of Joseph Zimmerman, Sheriff. Petitioner to pay costs. Petitioner excepts. Jour. 7-285.

June 22. Motion for New Trial filed.

June 22. Above motion overruled. Petitioner excepts and is given leave to file Bill of Exceptions. Jour. 7-286.

June 23. Bill of Exceptions of Petitioner filed.

June 23. Time waived; Bill of Exceptions presented to the Court of Appeals.

[fol. 95]

June 23. Bill of Exceptions returned by Court of Appeals.

June 27. Motion to stay execution of Judgment and order filed.

June 29. Above motion denied. Petitioner excepts. Jour. 7-292.

Clerk's certificate to foregoing paper omitted in printing.

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[fol. 96] In Court of Appeals of Lucas County, Ohio

Journal Entries

At a term of the above named court begun and held before the Hon. Harry W. Lloyd, Hon. Silas S. Richards, Hon. Roy H. Williams, presiding judges, on the 16th day of May, A. D. 1932, among other proceedings had by and before said Court on the 14th day of June, A. D. 1932, being the 25th day of said term, as appears by its Journal of that day, were the following, viz.:

C. A. No. 2692

Ex Parte John W. Koehrman

On the application of John W. Koehrman, upon his filing the petition herein, a writ of habeas corpus is hereby granted as prayed for in said petition, returnable at 9:30 a. m., Wednesday, June 15, 1932. Bond is fixed in the sum of $100.00 personal cognizance.

Court of Appeals, by Harry W. Lloyd, Presiding Judge.

In Court of Appeals of Lucas County

C. A. No. 2692

Ex Parte John W. Koehrman

Judgment—June 22, 1932

Now came the Respondent herein, Joseph Zimmerman, Sheriff of the County of Lucas and State of Ohio, and made return of the writ of habeas corpus heretofore issued in this case, and also brought the body of the said John W. Koehrmann, petitioner herein.

Whereupon, the court having heard and considered the evidence offered by the petitioner and the respondent, the arguments of counsel and being fully advised in the premises, finds that the said John W. Koehrman is lawfully detained and imprisoned by the said Joseph Zimmerman, Sheriff of Lucas County, Ohio.

It is, therefore, ordered, adjudged and decreed that the [fol. 97] petition of the said petitioner, John W. Koehrman, be and the same hereby is dismissed, and he is remanded to the custody of the said Joseph Zimmerman, Sheriff of Lucas County, Ohio; and it is further ordered that the said petitioner pay the costs of this proceeding.

To all of which orders, judgments and decrees of the court the said petitioner, John W. Koehrman excepts.

On the 22nd day of June, 1932, being the 32nd day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2692

Ex Parte John W. Koehrman

This cause came on to be heard on the petitioner's motion for a new trial and was submitted to the court. Upon consideration thereof the court finds that said motion is not well taken and the same ought to be and hereby is overruled; to which action and order of the court the petitioner objects and excepts, and upon his application is given leave to prepare and file a bill of exceptions herein.

On the 29th day of June, 1932, being the 38th day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2692

Ex Parte John W. Koehrman

The petitioner's motion for an order suspending and staying execution of the judgment of this court discharging the writ of habeas corpus and remanding him to the custody of the Sheriff of Lucas County and dismissing his petition, having this day come on for hearing, the Court finds that said motion is not well taken and that it should be and the same is hereby denied.

To all of which petitioner excepts.

[fol. 98] No other Judgments or Decrees were rendered or Orders or Journal Entries made in said cause, as appears upon the Journal of said Court.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

The State of Ohio,
Lucas County, ss:

I, Geo. E. Hardy, Clerk of the Common Pleas and Courts of Appeal within and for the County of Lucas and State of Ohio, do hereby certify that the above foregoing Exhibits

numbered 1 to 10 inclusive, contain all the original Pleadings, Process Papers and Records, and a full and true Transcript of all the Docket and Journal Entries in said cause and proceeding in said Court and in the Court of Common Pleas of said County, in cause No. 2692 C. A. Ex Parte John W. Koehrman.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

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[fol. 99] In Court of Appeals of Lucas County, Ohio

C. A. No. 2692

Ex Parte John W. Koehrman

Petition for Writ of Habeas Corpus—Filed June 14, 1932

Your Petitioner, John W. Koehrman, respectfully represents he is unlawfully imprisoned and restrained of his liberty by Joseph Zimmerman, Sheriff of Lucas County, Ohio, in the County Jail of said County, without any legal authority, but under color of a pretended attachment issued by one William Purcell, styling himself a Notary Public in and for the County of Lucas, State of Ohio, a copy of which alleged attachment is attached hereto.

Your petitioner further says that no questions could have been asked him in the pretended taking of his deposition referred to in said attachment, calling for answers or production of any books, papers and records which were relevant or material to any issue in said cause of Sielcken-Schwarz vs. The Woolson Spice Company, et al., #131925 in the Common Pleas Court of Lucas County; that in fact, as your petitioner is advised, the petition in the cause in which it was attempted to take said deposition is demurrable because it does not state facts sufficient to constitute a cause of action, because the plaintiff has not legal capacity to sue and for other reasons, and, as hereinafter set forth, a demurrer on said grounds and other grounds is now in fact pending in the Court of Common Pleas of Lucas County, Ohio; that the subpœna which

was served on your petitioner purporting to require him to appear before a notary public and to produce books, papers and records (a copy of which subpœna is hereto attached) was illegal and void and called for the production of books, papers and records, without any adequate or definite description thereof or any designation of which thereof plaintiff claims to be relevant or material in said action; that petitioner is informed and believes and therefore avers that proper notice of the taking of said pretended deposition, such as to make it admissible in evidence on the trial of this cause, has not been made in that service of such notice [fol. 100] has not been made upon all of the defendants in said cause, and in that summons has not been served upon all of the defendants in said cause and cannot be served upon The Irving Trust Company, as Executor, one of said defendants; that petitioner is a resident of Lucas County, Ohio, in good health, and in every way capable of and expecting to appear at the trial of this cause in the Court of Common Pleas of Lucas County, Ohio, if called as a witness.

Petitioner further avers that the subpœna duces tecum served upon him, as aforesaid, constitutes an attempted unreasonable search and seizure such as is forbidden by the Constitution of the State of Ohio, including Section 14 of Article I thereof, among others, and by the Fourteenth Amendment to the Constitution of the United States, and that William Purcell, the Notary Public, before whom said depositions were, according to said pretended notice, to be taken, has attempted to exercise judicial power in violation of Section 1 of Article IV of the Constitution of Ohio by issuing the warrant for the arrest of your petitioner under which petitioner is, as aforesaid, now unlawfully restrained of his liberty by the Sheriff of this County. Petitioner says that he has been deprived of his liberty without due process or course of law and in violation of Section 1 of Article IV, Section 14 of Article I and Section 16 of Article I of the Constitution of the State of Ohio and in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner further says that one of the defendants in said cause did on the 11th day of June, 1932, file a demurrer to the petition therein upon the grounds, among others, that

plaintiff has not legal capacity to sue, and that the petition does not state facts showing a cause of action, and did on the said date file a brief in support of said demurrer, which said demurrer is pending in said Court of Common Pleas of Lucas County, Ohio, and certain of the defendants in said cause did, on or about the 4th day of June, 1932, file in said cause a motion to quash notice to take depositions and subpœnas duces tecum, and for an injunction, en- [fols. 101 & 102] joining and restraining plaintiff and her attorneys from taking depositions in said cause until such time, if any, as might be fixed by said Court of Common Pleas for so doing, which said motion and a supplement thereto praying for an injunction against the further taking of the aforesaid deposition, are now pending before said Court of Common Pleas. Said demurrer, motion and supplement to said motion have not been decided and no orders have been issued upon them.

Petitioner is advised and says that said demurrer, motion and supplement to said motion, are well taken and should be sustained and granted.

Petitioner further says upon information and belief that plaintiff was not in good faith in attempting to take his testimony, as aforesaid, and that it was not the intention of plaintiff or her expectation that said testimony should be transcribed or used in the trial of said cause, except for the purpose of endeavoring to learn and ascertain facts and information to which plaintiff is not lawfully entitled, and for the purpose of endeavoring to learn and ascertain the means by which certain of the defendants in said cause expected and intended to establish their defenses to the alleged claims asserted by plaintiff in her petition against said defendants.

Wherefore petitioner prays that a writ of habeas corpus be issued to the said Joseph Zimmerman, Sheriff of Lucas County, Ohio, and that petitioner be discharged from said imprisonment and restraint of his liberty.

Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

*Duly sworn to by John W. Koehrman. Jurat omitted in printing.*

[fol. 103] In Common Pleas Court of Lucas County, Ohio

No. 131925

Clara Sielcken Schwarz, Plaintiff,

vs.

The Woolson Spice Company, et al., Defendants

Subpœna Duces Tecum

John W. Koehrman, The Woolson Spice Company, Summit Street, Toledo, Ohio:

You are hereby commanded to appear before the undersigned, a Notary Public within and for the County of Lucas, State of Ohio, at the office of Fraser, Hiett, Wall and Effler, Seventh Floor of the Home Bank Building, Toledo, Ohio, at nine thirty o'clock A. M. on Monday, June 13, 1932, and then and there give evidence as a witness on behalf of the plaintiff in the above entitled action; and you will, at that time and place, produce and have with you the following papers and documents:

1. All contracts and copies of contracts at any time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company.

2. All records of any and all receipts by you of stock or cash dividends from The Woolson Spice Company during the year 1916 and since that date.

3. Any and all books, records and papers showing any division or distribution by you of any stock or cash dividends received by you from The Woolson Spice Company.

4. Any and all correspondence had by you with Hermann Sielcken and/or Crossman Sielcken of New York, N. Y., from 1895 to and including 1918.

5. All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, N. Y. and/or its successors, and/or any of its officers, agents and directors, including George E. Warren and Willard V. King, New York, N. Y. from 1916 to 1932 inclusive.

[fol. 104] 6. Any and all correspondence and copies of correspondence with The Alien Property Custodian, Washington, D. C., and/or any of the deputies, attorneys or agents of said The Alien Property Custodian of Washington, D. C. and New York, N. Y. from October 6, 1917 to date referring to the management of The Woolson Spice Company, the disposition of any and all of the stock of The Woolson Spice Company described in the petition filed herein, and/or Hermann Sielcken or his estate.

7. Any and all correspondence and copies of correspondence with Arthur Young & Company, New York, N. Y., and/or any of the members of said firm, their officers and agents of New York, N. Y., including Arthur Young, D. D. McKenzie and A. Vander Sommen, from the year 1916 to 1932 inclusive, referring to any audit, appraisal or examination of the books, records, affairs and/or stocks of The Woolson Spice Company during said period.

8. Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, Sorenson & Nielsen, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive, touching any of the business matters or affairs of The Woolson Spice Company, Hermann Sielcken, the estate of Hermann Sielcken, or any of the matters mentioned in the petition filed herein.

Hereof fail not under penalty of the law.

Given under my hand and seal at Toledo, Ohio, this 7th day of June, 1932.

William Purcell, Notary Public, Lucas County, Ohio.
William Purcell.

[fol. 105] In Court of Common Pleas of Lucas County, Ohio

No. 131925

Clara Sielcken Schwarz, Plaintiff,

vs.

The Woolson Spice Company, et al., Defendants

Notary's Order of Attachment

To the Sheriff of Lucas County, Ohio:

Whereas, in a certain action pending in the Common Pleas Court of Lucas County, Ohio, wherein Clara Sielcken Schwarz is plaintiff, and The Woolson Spice Company, et al., are defendants, the plaintiff filed with me a Notice to the defendants that it would, on the 13th day of June, 1932, take depositions of sundry witnesses at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, before me as Notary Public.

And, whereas, on the 7th day of June, 1932, at the request of the plaintiff, I issued a subpœna in said action whereby John W. Koehrman was commanded to appear before me, a Notary Public in and for the County of Lucas, Ohio, at the said office of Fraser, Hiett, Wall & Effler, Toledo, Ohio, there in on the 13th day of June, 1932, at 9:30 o'clock A. M., then and there to give evidence and the truth to say in a certain action wherein said Clara Sielcken Schwarz, is plaintiff, and The Woolson Spice Company, et al., are defendants.

And, whereas, said subpoena on the 7th day of June, 1932, was personally served on the said John W. Koehrman by myself, and fully appears by said return in the form of my affidavit endorsed thereon.

And, whereas, the said John W. Koehrman failed to attend, in obedience to said subpoena, as he was summoned to do.

You are therefore commanded to attach the said John W. Koehrman so as to have his body before me, William [fol. 106] Purcell, a Notary Public in and for Lucas County,

Ohio, at the said office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, Toledo, Ohio, forthwith, as well to answer the State of Ohio for said contempt in disobeying said subpœna, as to give his testimony in the action, in the recital of this writ mentioned, and have then and there this writ.

Given under my hand and official seal this 13th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Seal.) (Rubber stamp) William Purcell.

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[fol. 107] In Court of Appeals of Lucas County, Ohio

C. A. #2692

Ex Parte John W. Koehrman

Amendment to Petition for Writ of Habeas Corpus—Filed June 15, 1932

Now comes petitioner John W. Koehrman and by leave of court files this amendment to his petition for writ of habeas corpus herein and without waiving or in any extent abandoning any allegations in his orginal petition, alleges:

1. That a true copy of the petition in the cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County, Ohio, referred to in petitioner's original petition herein, is hereto attached, marked "Exhibit A", and made a part hereof.

2. That for the reasons set forth in petitioner's original petition herein and for the additional reasons set forth in this amendment to said petition, William Purcell, the Notary Public by whose pretended order your petitioner was arrested and held by the Sheriff of Lucas County, Ohio, had no jurisdiction to take your petitioner's deposition in said cause, to issue a subpœna for your petitioner, to order your petitioner to answer any question or to make any order or issue any warrant for the arrest or imprisonment of your

petitioner until he submit to testify in the premises, or otherwise.

3. That said Notary Public, as shown by his order of attachment attaching your petitioner and causing petitioner to be brought before him, assumed and attempted to exercise judicial power.

[fol. 108] 4. Said Notary Public, William Purcell, was wholly disqualified to make an order for the attachment of your petitioner and to cause petitioner to be brought before him under penalty of being punished for contempt for disobeying said subpœna, for the reason that said Notary Public had been employed by counsel for plaintiff in said suit of Clara Sieleken-Schwarz vs. The Woolson Spice Company, et al., to act as notary and stenographer in the taking of the deposition of your petitioner and the transcribing thereof and that the amount of the compensation of said Notary Public for such service was dependent in large part, if not wholly, upon the number of pages of such testimony or evidence by way of exhibits which he might take and transcribe or copy; that it was to the pecuniary interest of said Notary Public that he should compel your petitioner to testify and produce books, papers and records before him so that such compensation might be earned by said Notary Public, and that said Notary Public was necessarily subject to the bias of his own personal pecuniary interest in determining whether or not an attachment should be issued for the bringing of petitioner before him to give his testimony in said action before said Notary Public, and for said reason said attachment was issued illegally and in violation of the Fourteenth Amendment of the Constitution of the United States.

5. That on the 14th day of June, 1932, after the Honorable Robert A. Gosline, Judge of the Court of Common Pleas of Lucas County, Ohio, before whom were pending the motions for injunctions, etc., referred to in your petitioner's petition herein, had been informed that this proceeding in habeas corpus was to be filed herein, announced that he would overrule said motions for injunction unless they were voluntarily withdrawn by the defendants in said cause who had filed same and thereupon said motions were withdrawn by said defendants.

6. Your petitioner says that the only color of authority which said William Purcell had for the issuance of the at-

tachment of your petitioner is by virtue of the provisions of [fol. 109] Sections 11510, 11511 and 11512 of the General Code of the State of Ohio; that if said sections or any of them are or can be construed to authorize the issuance of said order of attachment herein by said William Purcell as Notary Public and as compelling the appearance of petitioner before said Notary Public to give testimony and produce books, papers and documents in pursuance of said order of attachment, then said sections of the statutes and each of them are void and unconstitutional by reason of the provisions of Section 1 of Article I, Section 5 of Article I, Section 10 of Article I, Section 14 of Article I, Section 16 of Article I, Section 1 of Article IV, and Section 32 of Article II of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States, and are wholly ineffective to invest said Notary Public with lawful power or jurisdiction to take such actions and proceedings or any of them.

Wherefore your petitioner prays as in his petition herein.
Marshall, Melhorn, Marlar and Martin and Tracy, Chapman & Welles, Attorneys for Petitioner.

*Duly sworn to by John W. Koehrman. Jurat omitted in printing.*

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[fol. 110] In Court of Common Pleas of Lucas County

No. 131925

Exhibit "A" to Amendment to Petition

Clara Sielcken-Schwarz, New York, Plaintiff,

v.

The Woolson Spice Company, a corporation, 2700 Summit Street, Toledo, Ohio. John W. Koehrman, 1719 Superior Street, Toledo, Ohio. Franklin H. Biggs, 2613 Glenwood Avenue, Toledo, Ohio. Marion M. Miller, 2260 Scottwood Avenue, Toledo, Ohio. Frank D. Stranahan, Dixie Highway, Toledo, Ohio. Robert A. Stranahan, Ottawa Hills, Toledo, Ohio. Ammi F. Mitchell, 2057 Glenwood Avenue, Toledo, Ohio. Leroy E. Eastman, 3416 Brookside Road, Toledo, Ohio, as Administrators of the Estate of William

A. Brigham, deceased. Irving Trust Company, a foreign corporation, as Executor of the last will and testament of Herman Sielcken, deceased, Society for Savings Building, Cleveland, Ohio, Defendants.

PETITION FOR EQUITABLE RELIEF

The above named plaintiff, Clara Sielcken-Schwarz, for her cause of action against the above named defendants respectfully alleges and shows:

[fol. 111] 1. That the plaintiff, Clara Sielcken-Schwarz, at and prior to the time of the commencement of this action, was and now is a citizen of the United States and a resident of the State of New York, residing in the City and County of New York in said State.

2. That the defendant, Irving Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in New York City in said State; that said corporation is duly qualified to do business in Ohio and has appointed a statutory agent pursuant to the Ohio statutes and that said corporation is doing business in this State.

3. That the defendant, The Woolson Spice Company, at all times hereinafter mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and has its principal place of business at the City of Toledo, in said State; that at all times prior to, on or about July 25th, 1918, the total capital stock of said corporation consisted of 1,800 shares of common stock of a par value of One Hundred Dollars ($100.00) per share.

4. That the defendants, John Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan and Robert A. Stranahan, are citizens and residents of the City of Toledo, County of Lucas, State of Ohio, and that the defendants Ammi F. Mitchell and Leroy E. Eastman are the duly qualified and acting administrators of the estate of William A. Brigham, deceased, who at the time of his death was a resident of the City of Toledo, County of Lucas, State of Ohio.

5. That Herman Sielcken, who was a citizen of the United States and domiciled in the City, County and State of New York, died on or about the 8th day of October, 1917, leaving a last Will and Testament wherein he appointed The Columbia-Knickerbocker Trust Company, a corpora- [fol. 112] tion organized and existing under the laws of the State of New York, Executor of his said Will; that thereafter and on or about the 25th day of January, 1918, the said Will was duly admitted to Probate by the Surrogates Court of the County of New York, State of New York, and letters testamentary on the said Will were thereupon duly issued by one of said Surrogates to The Columbia Trust Company, a corporation organized and existing under the laws of the State of New York, as the successor of said The Columbia-Knickerbocker Trust Company; that thereafter and prior to the commencement of this action the defendant, Irving Trust Company, by certain mesne changes of corporate name, became and now is the continuation of the corporate entity and identify of said Columbia Trust Company and thereupon became the duly qualified and acting Executor of said Last Will; that the defendant, Irving Trust Company, has never been discharged as such Executor and that no other individual or corporation has been appointed Executor of said Last Will or administrator of the estate of said Herman Sielcken by said Surrogates Court or by any other court.

6. That said Herman Sielcken, in and by his Last Will and Testament, after providing certain specific legacies all of which have been fully paid and satisfied, gave, devised and bequeathed all the rest, residue and remainder of his property and estate, real and personal, whatsoever and wheresoever situate, absolutely to his wife, Clara Sielcken (by subsequent remarriage Clara Sielcken-Schwarz) who is the plaintiff herein, and that said plaintiff is now the full, complete, absolute and sole beneficial owner of all unadministered and undistributed assets of the estate of said Herman Sielcken.

7. That since the death of the said Herman Sielcken the plaintiff remarried and her present name is Clara Sielcken-Schwarz.

8. That heretofore and prior to the commencement of this action, the plaintiff duly requested the defendant,

Irving Trust Company, as Executor of the Last Will and Testament of said Hermann Sielcken, deceased, to bring [fol. 113] this action in behalf of said estate and sought to persuade said defendant so to do, but that the said defendant has failed, neglected and refused to bring said action, and, therefore, this plaintiff has joined said Irving Trust Company, as such Executor, as a defendant in this action.

9. That at the time of his death said Herman Sielcken was the sole beneficial owner of 824 shares of the capital stock of the defendant, The Woolson Spice Company, said shares being registered on the books of the said corporation in the name of Crossman & Sielcken, under which name the said Hermann Sielcken carried on business; that in addition to said 824 shares there was registered on the books of the said corporation in the name of said Hermann Sielcken, 360 of said shares.

10. That on the 6th day of April, 1917, the Congress of the United States declared that a state of war existed between the United States and Germany and on the 6th day of October, 1917, the Congress of the United States enacted and the President approved the Act known as "The Trading with the Enemy Act."

11. That said Hermann Sielcken at the outbreak of war between the United States and Germany was, as the defendants and said William A. Brigham well knew, temporarily present in Germany on business in behalf of the defendant, The Woolson Spice Company.

12. Plaintiff is informed and believes that the said Herman Sielcken, in the year 1909 acquired by purchase thereof 1,739 shares of the common capital stock of the defendant, The Woolson Spice Company, out of the said total capitalization of 1,800 common shares; that said Hermann Sielcken from the year 1909 until in or about the month of September, 1917, was president and a director of the defendant, The Woolson Spice Company; that subsequent to the purchase by him of said 1,739 shares, said Hermann [fol. 114] Sielcken from time to time sold certain of said shares to various persons including the defendants, Koehrman and Biggs, and said William A. Brigham, but for a large portion of said shares so sold said Hermann Sielcken did not receive prior to his death the purchase price, in-

cluding the purchase price of the shares sold to said defendants, Koehrman and Biggs, and said Brigham, and held said shares so sold as collateral to secure the purchase price thereof; that prior to the ousting of said Hermann Sielcken as president of the defendant, The Woolson Spice Company, as hereinafter more specifically related, the said Brigham was secretary and a director, the defendant Koehrman was general manager and a director, and the defendant Biggs was superintendent and a director of the defendant, The Woolson Spice Company, and were intimately associated in the conduct of the affairs of said corporation with said Hermann Sielcken, who, as hereinbefore stated, owned or controlled a majority of the capital stock thereof and by reason of such control maintained the defendants, Koehrman and Biggs, and said Brigham, in their said positions; that because of their intimate association and acquaintance with the business of the defendant, The Woolson Spice Company, over a period of many years, the defendants, Koehrman and Biggs, and said Brigham were informed upon every detail of said business and well knew the prosperous condition of the affairs of the said corporation.

13. Plaintiff is informed and believes that in or about the month of September, 1917, it being well known to the defendants, Koehrman and Biggs, and said Brigham, that the said Hermann Sielcken was being detained in Germany by the exigencies of the said war between the United States and Germany, that the said Hermann Sielcken was then suffering from a prolonged and serious illness which prevented him from traveling, that even in the event of peace [fol. 115] between the United States and Germany his illness would indefinitely prevent him from returning to his domicile in the United States and that it would be impossible for him to frustrate their plans, said defendants, Koehrman and Biggs, and said Brigham, impelled by motives of avarice, am-ition and hatred toward Hermann Sielcken, and in furtherance and as a part of a fraudulent conspiracy (conceived among them during the spring and summer of 1917) illegally and wrongfully to acquire the control of said The Woolson Spice Company from said Hermann Sielcken, and otherwise to defraud him and to dominate, manage, control, manipulate and exploit said corporation in their own interests, caused to be held a pre-

tended meeting of the Board of Directors of the defendant, The Woolson Spice Company, and by means of their control of the said Board of Directors in the absence of said Hermann Sielcken and without his knowledge or authority wrongfully and fraudulently ousted the said Hermann Sielcken from his office as President of defendant, The Woolson Spice Company, and also wrongfully and fraudulently ousted from his office as Treasurer of defendant, The Woolson Spice Company, one, S. P. Jermain, who, in his capacity as said Treasurer, for many years had been a trusted and loyal representative, associate and adviser of the said Hermann Sielcken, and proceeded to a pretended election of the said Brigham as President of defendant, The Woolson Spice Company; that thereafter and at all times mentioned herein and as a result of the aforesaid wrongful acts, the defendants, Koehrman and Biggs, and said Brigham controlled and dominated the defendant, The Woolson Spice Company, and controlled and regulated the public and private reports of its business, general condition and ownership of its stock, and did fraudulently manipulate the defendant, The Woolson Spice Company, and said reports for their own purposes, as here-
[fol. 116] inafter more specifically set forth.

14. Plaintiff is informed and believes that in justification of their action in ousting Sielcken and seizing control of The Woolson Spice Company and as a further step in the consummation of the said fraudulent conspiracy, the defendants, Koehrman and Biggs, and said Brigham, although they well knew that said Hermann Sielcken in his lifetime and at the time of his death was a citizen of the United States and domiciled in the City, County and State of New York and was not an enemy within the meaning of that term as defined in the "Trading with the Enemy Act", and although they well knew that said Hermann Sielcken had died on October 8, 1917, and that title to all his property in the United States had vested in The Columbia Trust Company as Executor, falsely and maliciously caused to be publicly announced and reported to the Alien Property Custodian that the said Hermann Sielcken was a resident of Germany and an enemy of the United States under the provisions of said "Trading with the Enemy Act", and that said Hermann Sielcken was the owner of the shares of stock of said Woolson Spice Company herein-

before mentioned; that the said defendants and said Brigham, by said false and malicious reports, intended to conceal and distract attention from their wrongful and fraudulent seizure of the control of The Woolson Spice Company in their own interests and hoped thereby to perpetuate and render easier and less likely of discovery their management, control, manipulation, and exploitation of said corporation in their own interests.

15. That upon the qualification of the said Columbia Trust Company as Executor of the said Last Will and Testament of the said Hermann Sielcken and for the purposes of the due administration and distribution of said estate, title to the said 824 shares of stock of the defendant, The Woolson Spice Company, and title to the interest [fol. 117] of said Hermann Sielcken in said 360 shares of said stock, vested in said Columbia Trust Company as such executor.

16. Plaintiff is informed and believes that prior to or shortly after the appointment of The Columbia Trust Company as executor as aforesaid, the defendants, Koehrman and Biggs, and said Brigham broadened and enlarged the scope of their fraudulent conspiracy to include a plan to acquire the said 824 shares and the said 360 shares of the capital stock of the defendant, The Woolson Spice Company, for a grossly inadequate consideration for themselves and the defendants, Miller, Frank D. Stranahan and Robert A. Stranahan, to whom the said plan was communicated and who aided, abetted and participated in said fraudulent plan.

17. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy, wrongfully and illegally to acquire said stock at a grossly inadequate consideration, the defendants, Koehrman and Biggs, and said Brigham aided and abetted by sundry other persons, and taking advantage of their wrongful control and domination over the affairs of the defendant, The Woolson Spice Company, and taking advantage of their peculiar and superior knowledge of the affairs of said Company and of the necessity of the said Executor to rely upon them for information concerning the business of said Company, carried on a campaign of misrepresentation calculated and designed to mislead and deceive the said Executor as to the value of said

stock and as to the necessity of an immediate sale to avoid practically total loss. Plaintiff is further informed and believes that as part of said campaign of misrepresentation said individual defendants and said Brigham falsely and fraudulently misrepresented to said Columbia Trust Com-
[fol. 118] pany, as such Executor, that said stock was of small and constantly decreasing value, although in truth and in fact, as such defendants and said Brigham well knew, said stock was of a value of upwards of $2,000.00 per share and was constantly appreciating in value, that the fact that the Estate of Hermann Sielcken, who said defendants falsely and wrongfully asserted had been an alien enemy, owned the said 824 shares of stock which had theretofore been transferred into the name of said Trust Company as such Executor, had seriously injured and was progressively injuring the business of the defendant, The Woolson Spice Company, that such circumstances had seriously depreciated and was progressively depreciating the value of said stock, that an immediate sale was necessary to save the business from destruction, that orders were being cancelled daily, that unless an immediate sale were made the said stock could not be sold at all and that only a very small amount could then be realized through liquidation. Plaintiff is further informed and believes that the individual defendants and said Brigham well knew that the business of the defendant, The Woolson Spice Company, had not been injured and depreciated, but on the contrary was in a very prosperous condition, that the volume of said business had largely increased over the preceding year, that said Company had large contracts for furnishing coffee, spices and supplies to the armies of the United States, that unusual profits were anticipated, and that said stock had not depreciated in value, but on the contrary, would, as the individual defendants and said Brigham well knew, be largely increased in value so soon as the secret knowledge of such defendants and said Brigham as to the increased business and the prosperity of the defendant, The Woolson Spice Company, should become known to the public generally. Plaintiff is further informed and believes that said false and wrongful misrepresentations were
[fol. 119] intended to and did cause said Columbia Trust Company, as such Executor, which was unfamiliar with the affairs and business of said corporation, and which neces-

sarily as a fiduciary stockholder of such corporation relied upon the reports, statements and representations of the defendants and said Brigham, who were the managing officers and directors of said corporation as aforesaid, as to the condition of its affairs, to believe that it would be impossible to secure a substantial price for the said stock, that said stock had greatly depreciated in value and was constantly depreciating in value, and that an immediate sale of said stock was necessary to avoid a total loss of said asset of the said estate. Plaintiff is further informed and believes that as a result of the aforesaid misrepresentations so relied upon the Executor was fraudulently induced to sell said stock to the individual defendants and said Brigham for a grossly inadequate price, as hereinafter more particularly set forth.

18. Plaintiff is informed and believes that in furtherance of said conspiracy the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, falsely and fraudulently represented to and advised The Columbia Trust Company that any publicity regarding a sale of said shares or any attempt to obtain purchasers for said shares, other than said individual defendants and said Brigham, would react disastrously on the business of said Woolson Spice Company and the value of said shares; that thereby said Columbia Trust Company, as such Executor, was misled and induced to refrain from calling said shares to the attention of other persons who might be interested therein as purchasers and to refrain from advertising the fact that said shares of stock were for sale, and was thereby misled into making a hurried sale of said shares to said defendants Koehrman, Biggs, Miller, [fol. 120] Frank D. Stranahan and Robert A. Stranahan and to said Brigham, without competition, publicity or adequate advertising in the press, for a grossly inadequate price; that said defendants and said Brigham, who were the directors and managing officers of The Woolson Spice Company, and the other individual defendants associated with them in said fraudulent conspiracy, took advantage of the peculiar knowledge of said officers as to the prosperity of the defendant, The Woolson Spice Company, and the value of its stock, to acquire the shares of such fiduciary

stockholder, The Columbia Trust Company, for a grossly inadequate price.

19. Plaintiff is informed and believes that in furtherance of said conspiracy the defendants, Koehrman and Biggs, and said Brigham conspiring among themselves and sundry other persons, falsely and fraudulently represented to and threatened The Columbia Trust Company that unless said shares were immediately sold to the individual defendants and said Brigham at a price fixed by them or if said shares were sold to any other person or persons, then they, the managing officers and directors of the defendant, The Woolson Spice Company, would forthwith leave the employ of said corporation and involve it in immediate disaster and ruin; that thereby said Columbia Trust Company, as such executor, was misled and wrongfully coerced into making a hasty sale of said shares to the said individual defendants and to said Brigham at a grossly inadequate price fixed by them and upon their own terms and without attempting to obtain bids from other possible purchasers.

20. Plaintiff is informed and believes that as part of and in furtherance of said conspiracy to acquire said shares at a grossly inadequate price, the defendants, Koehrman and Biggs, and said Brigham falsely and fraudulently mis-[fol. 121] represented the condition of said Company to other prospective purchasers of said stock and attempted to and did effectively foreclose competition by such misrepresentation and by making threats to prospective purchasers that if such prospective purchasers competed with the individual defendants and said Brigham in the matter of the acquisition of said shares, then the management of the defendant, The Woolson Spice Company, would immediately quit and involve the corporation in chaos and ruin.

21. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy the defendants, Koehrman and Biggs, and said Brigham attempted to conceal from said Columbia Trust Company, and as officers and directors of defendant, The Woolson Spice Company, prevented said corporation from disclosing to The Columbia Trust Company the existence of an alleged claim in favor of the defendant, The Woolson Spice Company, or that said corporation asserted an alleged claim against the estate of

Hermann Sielcken in a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00). Plaintiff is further informed and believes that when prior to the said sale of said shares of The Woolson Spice Company to the individual defendants and said Brigham, The Columbia Trust Company, as such Executor, learned of the existence of said alleged claim from other sources, said individual defendants and said Brigham falsely and fraudulently represented to and assured The Columbia Trust Company that said alleged claim had little if any merit and that a recovery thereon, if any, would be of a negligible amount, although said individual defendants and said Brigham then believed they could and intended to take advantage of the [fol. 122] death of Hermann Sielcken, the circumstance that they were the sole survivors who had personal knowledge of many of the relations between the defendant, The Woolson Spice Company, and Hermann Sielcken in his life time, and their complete domination and control over the defendant, The Woolson Spice Company, its books, papers and records to enable said defendant, The Woolson Spice Company, through their connivance and assistance successfully to prosecute such alleged claim and recover from the estate of Hermann Sielcken a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00), and further falsely and fraudulently represented to and assured The Columbia Trust Company that neither they nor the defendant, The Woolson Spice Company, had any intention to assert said alleged claim against the estate of Hermann Sielcken, either presently or after the sale of said shares, although said individual defendants and said Brigham well knew that the defendant, The Woolson Spice Company, was at the time of such representations and assurances intending and planning to assert said claim as soon as the sale of said shares should be consummated, and although said individual defendants and said Brigham, as officers, directors, shareholders and prospective shareholders of de fendant, The Woolson Spice Company, were at the time of making such representations and assurances intending to force and compel the defendant, The Woolson Spice Company, to assert said alleged claim as soon as the sale of said shares should be consummated. Plaintiff is further informed and believes that the individual defendants and

said Brigham, by means of such and sundry other false and deceitful representations, assurances and advices, misled, induced and wrongfully prevailed upon The Columbia Trust Company as such Executor, to make a hurried sale of such shares to the individual defendants and to said [fol. 123] Brigham without asking an adequate or thorough investigation of said alleged claim, or without judicially determining or settling the same. Plaintiff is further informed and believes that said individual defendants and said Brigham so attempted to conceal such alleged claim, so prevented The Woolson Spice Company from divulging the same, made such false representations and deceitful assurances and caused said corporation to delay asserting said alleged claim against the estate of said Hermann Sielcken until after the consummation of said sale in order that the value of said shares might not thereby be increased because of the existence of said alleged claim or by the fruits thereof, should the same be settled or judicially determined prior to said sale. Plaintiff is further informed and believes that the defendant, The Woolson Spice Company, aided and abetted the individual defendants and said Brigham in consummating said conspiracy to purchase the aforesaid shares for a grossly inadequate price, actively participated therein and delayed asserting said alleged claim against the estate of Hermann Sielcken in order that the individual defendants and said Brigham might acquire the controlling interest in said corporation prior to the assertion of said alleged claim, in the expectation and with the purpose of thereby more effectively prosecuting said claim against the estate of said Hermann Sielcken. Plaintiff is further informed and believes that subsequent to the sale of said shares the said individual defendants and said Brigham caused the defendant, The Woolson Spice Company, to assert and the said corporation did assert the said claim against the said estate and instituted an action in the Supreme Court of the State of New York against said Columbia Trust Company as such Executor, to recover said amount, and that thereafter such proceedings were had in the said action that said Columbia Trust Company, as such executor, settled and compromised [fol. 124] the said claim by the payment to the defendant, The Woolson Spice Company, of the sum of Two Hundred

**Eighty-four Thousand Six Hundred Eighty-nine and 16/100 Dollars ($284,689.16) from the funds of the estate, no part of which sum was taken into consideration on arriving at the value of said stock.**

22. Plaintiff is informed and believes that, it being well known to said individual defendants and to said Brigham that certain loyal personal and business friends, associates and trusted advisers of the said Hermann Sielcken, including John Doyle, general counsel and former director of the defendant, The Woolson Spice Company, and Joseph Picksley, director and stockholder of The Woolson Spice Company, would exert their powers and influence to prevent a sale of said shares of the grossly inadequate price of approximately Six Hundred Eighty Dollars ($680.00) per share contemplated by said individual defendants and said Brigham and it being feared by said individual defendants and said Brigham that if said friends, associates and advisers of the said Hermann Sielcken were forewarned of said sale and said proposed price they might thwart said conspiracy by correctly informing the Columbia Trust Company as to the value of said shares and as to the existing and expected prosperity of The Woolson Spice Company, and by informing it of other persons who would be interested in purchasing said shares, the said individual defendants and said Brigham, in furtherance of said fraudulent plan to acquire said stock and conspiring among themselves and with sundry other persons, concealed from the said friends, associates and advisers of Hermann Sielcken the facts that said shares of stock were for sale and that they contemplated purchasing the same, the price which they planned to pay for said shares and all the details arranged in connection with said sale as hereinabove and hereinafter more specifically set forth, and by means of the aforesaid and sundry other false and deceitful misrepresentations, [fol. 125] advices, assurances, concealments and threats, induced The Columbia Trust Company, as such executor, to conceal said facts, price and details from the said friends, associates and advisers of Hermann Sielcken.

23. Plaintiff is informed and believes that in consummation of said conspiracy the individual defendants and said Brigham, aided and abetted by sundry other persons, by means of the aforesaid false and deceitful misrepresenta-

tions, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such Executor, to enter into a private agreement to sell said shares to the individual defendants and to said Brigham at the grossly inadequate price of $680.00 per share, although, as said defendants and said Brigham well knew, the market value of said stock was approximately $2,000.00 per share.

24. That thereafter, as plaintiff is informed and believes, the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, coerced and misled the Executor into consenting to a pretended auction sale (at which in fact competitive bidding had been foreclosed as hereinafter set forth) for the purpose of concealing the private contract of purchase of said shares of The Woolson Spice Company which said individual defendants and said Brigham had obtained through the fraud, deception and coercion practiced upon said Executor and to create an appearance that said sale rested upon a public auction in the hopes of foreclosing inquiry into the private contracts of sale so effectuated through the fraud of said individual defendants and said Brigham.

25. Plaintiff is informed and believes that shortly prior to the 24th day of July, 1918, said individual defendants and said Brigham were advised by The Columbia Trust [fol. 126] Company that said 824 shares and said 360 shares would be put up for sale at auction in the City of New York on July 24, 1918, that thereupon in furtherance of said conspiracy and for the purpose of chilling the bidding at said auction sale, said individual defendants, said Brigham and sundry other persons, each of whom was a prospective bidder for said shares, and all of whom were aided and abetted by sundry other persons, wrongfully and fraudulently agreed among themselves that one of their number, to-wit, the defendant, Marion M. Miller, would bid for and purchase said shares without competition from the other individual defendants and said Brigham and said other persons and that upon the acquisition of said shares by the said Marion M. Miller, the same should be divided among said individual defendants, said Brigham and said other persons; that in compliance with said wrongful agreement the defendant, Marion M. Miller, attended said auction sale and purchased said shares without competition

at a grossly inadequate price, said other individual defendants, said Brigham and other persons, in accordance with said agreement, refraining from bidding therefor, and that forthwith said shares were divided among the said conspirators as theretofore agreed upon.

26. Plaintiff is informed and believes that in order to further wrongfully chill the bidding at said auction sale said individual defendants and said Brigham conspiring among themselves and sundry other persons, by means of the aforesaid false and malicious representations, assurances, advices, concealments and threats, induced The Columbia Trust Company, as such Executor, to refrain from making any extensive or adequate advertising of said auction and to make certain special arrangements and agreements with them as to the terms of said auction sale, to-wit, that said individual defendants and said Brigham were to be permitted to make a deposit of $100,000.00 with The Columbia Trust Company as a down payment on said shares and were to be allowed thirty days after said auction [fol. 127] within which to pay the balance of their purchase price, whereas, the public and all other prospective purchasers were to be required to deposit 10% of their bids with the auctioneer at the time of the sale, and to pay the balance thereof to such auctioneer before one o'clock on the day following said sale.

27. Plaintiff is informed and believes that on or about the 24th day of July, 1918, said Columbia Trust Company, as such Executor, misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of said individual defendants and said Brigham, put up the said 824 shares and said 360 shares at auction in the City of New York, and, without adequate notice or advertisement of said sale, sold said 824 shares and said 360 shares without competition to the defendant, Marion M. Miller, on behalf of himself and said other individual defendants and said Brigham, at the terms theretofore agreed upon as aforesaid at the price of Six Hundred Eighty Dollars ($680.00) per share, although the said individual defendants and said Brigham knew that the market value of said stock was approximately Two Thousand Dollars ($2,000.00) a share.

28. That thereafter the said Columbia Trust Company, as such Executor, still being misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of the individual defendants and said Brigham, caused to be presented to the defendant, The Woolson Spice Company, certificates for the said shares of stock, and said defendant, The Woolson Spice Company, with full knowledge that the transfer of said stock was the consummation of a gross fraud upon said Executor by the individual defendants and said Brigham, and with the expectation of deriving certain improper and unjustifiable benefits therefrom, as hereinbefore more [fol. 128] particularly set forth, thereupon actively aided, abetted and participated in the consummation of said fraud and wrongfully and illegally transferred said stock into the names of the individual defendants and said Brigham and/or their nominees and caused certificates therefor to be issued and delivered accordingly.

29. Plaintiff is informed and believes that prior to the purchase of said shares as aforesaid and in furtherance of said conspiracy to acquire the same at a grossly inadequate price, the said individual defendants and said Brigham having insufficient means with which to effect said purchase without assistance, knowing full well that the defendant, The Woolson Spice Company, was in a position to make a large cash distribution by way of dividends and/or to borrow large sums from sundry financial institutions, and taking advantage of their peculiar knowledge of the condition and affairs of the defendant, The Woolson Spice Company, and of their control and domination over said corporate defendant as aforesaid, conspired and arranged with the defendant, The Woolson Spice Company, and sundry other persons that upon the consummation of the aforesaid sale the defendant, The Woolson Spice Company, would procure and advance and/or distribute to the individual defendants and to said Brigham sufficient funds with which to pay for said shares; that the aforesaid arrangement was concealed from The Columbia Trust Company as such executor, it being led to believe by the individual defendants and said Brigham as aforesaid that the defendant, The Woolson Spice Company, was without excess assets and had a restricted and weak credit and that its prospective earning capacity was rapidly declining; that because of such concealments

and misrepresentations The Columbia Trust Company, as such Executor, was induced to make said sale as hereinabove set forth; that shortly after the sale of said shares as afore- [fol. 129] said and prior to the payment of the purchase price thereof, the defendant, The Woolson Spice Company, procured and distributed and/or advanced to the individual defendants and to said Brigham a sum or sums of money sufficient to pay the purchase price of said shares as theretofore arranged as aforesaid between the defendant, The Woolson Spice Company, and said individual defendants and said Brigham with the help and assistance of sundry other persons.

30. That since said issue and delivery of said certificates to said individual defendants and said Brigham and/or their nominees, the defendant The Woolson Spice Company has paid sundry dividends to said individual defendants, said Brigham, their nominees and transferees in stock and money, no part of which has been paid to the Executor of the estate of Herman Sielcken or to any beneficiary of that estate; and that the plaintiff, as the residuary legatee and beneficiary of said estate, has been thereby deprived by the said fraud and wrongdoing of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, of the said 824 shares of stock and of the dividends declared and paid thereon, or of a large sum of money representing the fair market value of said stock and the amount or value of said dividends with interest from the date of payment.

31. That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth, were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date.

32. Plaintiff is ready, able and willing to pay to the defendants or any one of them, such sum or sums of money, if any, as this Court may determine is due and owing to any [fol. 130] or all of the individual defendants or to the defendant administrators of the estate of said Brigham, by reason of the payment by them and said Brigham of the aforementioned sums as purchasers of said shares, or plaintiff is ready and willing to have this Court set off against

any sum which it may determine to be due and owing to plaintiff or to the Irving Trust Company, as such Executor, by any of the defendants any sum which the said defendants or said Brigham may have paid as purchasers of said stock.

33. That the plaintiff is without adequate remedy at law.

Wherefore, the plaintiff prays:

1. That the defendant, The Woolson Spice Company, be required to account to the plaintiff for the said 824 shares of its common capital stock or such shares as the said 824 shares of stock may represent in any recapitalization of said Company which may have occurred since the sale of said 824 shares and register the plaintiff upon its books as the owner of said stock, and issue to her certificates for said shares of stock.

2. That in the event that The Woolson Company does not have in its treasury or under its control sufficient shares of stock to enable it to issue to the plaintiff certificates for said shares of stock, that the Court require the defendant, The Woolson Spice Company, the individual defendants herein and said defendant administrators, Ammi F. Mitchell and Leroy E. Eastman, to pay to said plaintiff the reasonable value of said shares of stock or the reasonable value of such shares of stock as may be represented by said 824 shares in any recapitalization of said corporation.

3. That the defendant, The Woolson Spice Company, the individual defendants and said defendant administrators be required by the decree of this court to account to the plaintiff for all dividends which have accumulated and/or been paid upon said 824 shares of stock since July 25, 1918, or upon any stock represented by said 824 shares of stock in [fol. 131] any recapitalization of said corporation, together with interest upon said dividends from the date of payment thereof.

4. That the individual defendants, said defendant administrators and each of them be required by order of this Court to produce and surrender for cancellation any certificates issued in their names or in the name of William G. Brigham for any of said 824 shares of stock or for any

shares of stock represented by said 824 shares in said recapitalization of said corporation.

5. That the individual defendants, said defendant administrators and the defendant, The Woolson Spice Company, be enjoined, except under order of this Court first having been obtained, from transferring any of its shares of stock or from issuing certificates for further shares of stock and from changing in any way its present capital structure.

6. That the plaintiff have such other and further relief in the premises as the Court may deem meet and just.

(Signed) Baker, Hostetler, Sidlo & Patterson.
(Signed) Fraser, Hiett, Wall & Effler, Attorneys for the Plaintiff.

*Duly sworn to by Clara Sielcken-Schwarz. Jurat omitted in printing.*

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[fol. 132] In Court of Appeals of Lucas County, Ohio

Ex Parte John W. Koehrman

Writ of Habeas Corpus

Filed June 15, 1932

State of Ohio,
Lucas County, ss:

To Joseph Zimmerman, Sheriff of Lucas County, Ohio:

We command you that the body of John W. Koehrman, in your custody detained and restrained of his liberty, as it is said, you take and have before the Court of Appeals of Lucas County, Ohio, or before one of the judges of said court, at the courtroom of said court in the courthouse of said county, on the 15th day of June, 1932, at 9:30 A. M. o'clock, to do and receive what said court or said judge shall then and there consider, concerning him in that behalf; and have you then and there this writ.

In witness whereof, I, George E. Hardy, Clerk of said Court of Appeals, have hereunto set my hand and affixed the seal of said court this 14th day of June, 1932.

(Signed) Geo. E. Hardy, Clerk, by (Signed) M. E. Theuerkauff, Deputy Clerk. (Seal.)

Sheriff's Return

Received this writ June 14th, 1932, at 10:45 A. M., and pursuant to its command I do now have, this 15th day of June, 1932, at 9:30 A. M., the body of John W. Koehrman before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said John W. Koehrman in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by (Signed) Rolland Staggemeier, Deputy.

Costs $.91.

[fol. 133] For the "writ and commitment papers" attached to the foregoing Return, see the writ of attachment of appellant, John W. Koehrman, which appears as an Exhibit to the Pleading entitled "Petition for Writ of Habeas Corpus", at pages 105 to 106, supra, of this Transcript; and the subpœna duces tecum on this appellant, which appears as an Exhibit to the same Pleading, at pages 103 to 104, supra, of this Transcript; both of which Exhibits are here incorporated by reference thereto as fully as though repeated verbatim.

The Sheriff's Return of service of said Writ of attachment, endorsed thereon, is as follows:

Sheriff's Return

Received this writ June 13, 1932, 11:25 A. M. and pursuant to its command I did attach the body of John W. Koehrman, June 14, 1932, and had him before William Purcell, Notary Public, Lucas County, Ohio, in the Court Room of the Court of Appeals, Lucas County, Ohio.

Joseph Zimmerman, Sheriff, Rolland Staggemeier, Deputy.

Costs $.91.

The Notary Public's return of service of said subpœna duces tecum, endorsed thereon, is as follows:

State of Ohio,
Lucas County, ss:

William Purcell, being first duly sworn, says that on Tuesday, June 7th, at about two thirty o'clock P. M., he served a copy of the within subpœna upon John W. Koehrman, personally, at the office of The Woolson Spice Company, Summit Street, Toledo, Ohio.

William Purcell.

Sworn to before me and subscribed in my presence [fol. 134] this 8th day of June, 1932. Fred M. Kramp, Notary Public, Lucas County, Ohio. (Seal.)

(Rubber stamp:) (Fred M. Kramp, Notary Public, Lucas County, Ohio.)

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[fol. 135] In Court of Appeals of Lucas County, Ohio

C. A. No. 2692

Ex Parte John W. Koehrman

Recognizance—Filed June 17, 1932

The State of Ohio,
Lucas County, ss:

Be it remembered, that on June 14th, 1932, John W. Koehrman personally appeared before this court, and acknowledged himself to owe the State of Ohio the sum of One Hundred Dollars ($100.00), to be levied of his goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the above bound John W. Koehrman be and appear before this Court of Appeals, on the fifteenth day of June, 1932, and abide the judgment of this court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

(Signed) John W. Koehrman.

Taken and acknowledged before me, on the day and year above written.

George E. Hardy, Clerk of the Court of Appeals.

[fol. 136] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

No. 2692

EX PARTE JOHN W. KOEHRMAN

MOTION FOR NEW TRIAL—Filed June 22, 1932

Now comes the petitioner, John W. Koehrman, and moves the Court to vacate and set aside the findings and judgment of the Court herein and for a new trial of this cause, for the following reasons materially affecting the substantial rights of such petitioner:

(1) The Court erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) The Court erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of the Court are contrary to law.

(4) The finding, decision and judgment of the Court are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court are erroneous, in that there is no evidence to sustain them.

(6) The Court erred in not finding and adjudging that the order of attachment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) The Court erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio; entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give and no books, papers or documents which petitioner could produce would be relevant or material to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for peti-

tioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

[fol. 137] The Court erred in not finding and adjudging that the petition of the plaintiff in said case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

(10) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to un-

reasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated."

(11) The Court erred in not finding and adjudging that Section 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Con-[fol. 138] stitution of Ohio, in that they attempt to confer judicial power on notaries public.

(13) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

(14) The Court erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require petitioner to attend as a witness or to produce any books, papers or documents or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) The Court erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in

contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) The Court erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and a denial of the right of redress in courts and of a remedy by due course of law in violation of section 16 of Article I of the Constitution of the State of Ohio, and were null and void.

[fol. 139] (17) The Court erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States and were null and void.

(18) The Court erred in not finding that the purported subpœna duces tecum issued by said notary was illegal and

void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

(19) The Court erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(20) The Court erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) The Court erred in other respects apparent on the face of the record.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner.

[fol. 140] [File endorsement omitted]

In Court of Appeals of Lucas County

**Petitioner's Bill of Exceptions**

Filed June 23, 1932.

Notified: Waived.

Delivered to Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23-32.

Received from Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23-32.

[fol. 141] [Title omitted]

Appearances:

Messrs. Tracey, Chapman & Welles, by Messrs. George D. Welles and Harry S. Bugbee; Messrs. Marshall, Melhorn, Marlar & Martin, by Mr. Stuart S. Wall, for the petitioner.

Messrs. Fraser, Hiett, Wall & Effler, by Mr. Harold W. Fraser; Messrs. Baker, Hostetler, Sidlow & Patterson, by Mr. R. T. Jackson, for the respondent.

Be it remembered that on the trial of the above entitled action in the Court of Appeals, Lucas County, Ohio, in the May Term of said Court, A. D. 1932, said trial beginning on the 15th day of June, A. D. 1932, before the Honorables Harry W. Lloyd, Silas S. Richards and Roy H. Williams, Judges of the said Court, the following proceedings were had, viz:

COLLOQUY

Mr. Welles: Mr. Stranahan, one of the petitioners was here and by consent of counsel he has been permitted to go subject to return on call. Before proceeding with this case we would like, if Your Honors please, to have leave to file in each of the three pending cases of Ex Parte Koehrman, Ex Parte Bevan and Ex Parte Stranahan leave to file amendments to the petition for writs of habeas corpus. We have given counsel on the other side copies of the proposed amendment.

Judge Lloyd: They may be filed.

Objection; exception.

Mr. Welles: We should direct the court's attention to the fact that there is, as we are informed, no return or answer from the sheriff at this time. We assume that before we proceed there should be.

Mr. Fraser: If your Honors please, the sheriff is here with the bodies of these men and with his return and I [fol. 142] understand the practice is to hand you the return when he hands you the bodies.

Mr. Welles: I may be in error, but I understand that the return constitued an answer which raised such issues, if any, of fact as the sheriff thought proper to raise and

that the question of the propriety of the custody really is dependent upon the return made by the sheriff, showing whether or not he does have legal custody.

Judge Lloyd: Have you the returns here? Let's see them.

Deputy Sheriff Staggemeier: Here they are (handing returns to the court).

Mr. Fraser: The return in each case is accompanied by the original papers under which the sheriff is holding these men, as an exhibiton to the court as to why he is holding them.

Judge Lloyd: I suppose we can go on with the hearing now.

Mr. Welles: May we see what the return says?

Judge Lloyd: Each is like the other. Here they are.

Mr. Welles: If your Honors please, in order to save time and get forward with this thing, we would like, with the court's permission, to save our objection to the return on the ground that it does not show any legal cause for the arrest or detention of any of the petitioners and without waiving that point we will proceed with the evidence, first making a statement. These three petitions for writs of habeas corpus arise by reason of writs issued by William Purcell, a notary public, in a case pending in the Court of Common Pleas of this county in which one Clara Sielcken Schwarz is the plaintiff and The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William A. Brigham, deceased, and The Irving Trust Company, a foreign trust company, as executor of the estate of Herman Sielcken, deceased, are named as defendants. The petitioner Bevan was served with a subpœna duces tecum, which is attached to his petition and he appeared before the notary and answered certain questions and then, upon the advice of his counsel, declined to an- [fol. 143] swer certain questions. Counsel for the defendants appeared at that occasion for the sole purpose, as shown by the record, of protesting and objecting to the taking of depositions on various grounds which I will come to in a moment. Petitioners Robert A. Stranahan and Frank D. Stranahan, were served with writs of attachment. I should say the petitioners Robert A. Stranahan and John

W. Koehrman were served with writs of attachment, requiring them to appear before the same notary public to give testimony and directing the sheriff to produce them for that purpose there. The petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company, et al., is one in which the plaintiff alleges that she is residuary legatee of Herman Sielcken, deceased, and that The Irving Trust Company, a New York corporation, is the executor, still undischarged and acting under the will of Herman Sielcken, deceased. The petition attempts to charge a conspiracy alleged to have been devised and carried out in the years 1917 and 1918 by the defendants Koehrman, Biggs, Miller, the two Stranahans, W. A. Brigham, deceased, represented by Mitchell and Eastman as administrators. It is also charged that The Woolson Spice Company was a co-conspirator with the individual defendants. The petition attempts to charge that a sale of stock of The Woolson Spice Company by The Irving Trust Company as executor to the individual defendants, or some of them, was brought about by fraudulent representations or misrepresentations. The plaintiff seeks to have the sale of the stock in the amount of 824 shares of the old stock of The Woolson Spice Company set aside. She requests that the existing stock of The Woolson Spice Company issued in lieu of that should be transferred to her, that the corporation should be required to do so and that she may have an accounting and that she may receive all dividends, disbursements of every kind, which have been made by The Woolson Spice Company to the owners of this stock from the year 1918 down to the present time. The petition is very lengthy, it contains some twenty-eight pages, but the main point claimed and the main relief asked is as I have stated. The plaintiff seeks to excuse the long delay in the presentation of this claim and in the attempt to enforce it by an [fol. 144] allegation to this effect, it is paragraph 31 of the petition:

"That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date."

That is all that there is in the way of explanation or attempted explanation as to why this matter has been permitted to rest since 1918. As I have said, the theory of this petition is that there was a fraud, an actual fraud, committed by the defendants so attempted to be charged. But as your Honors will see when you come to examine the petition in the main case, nearly every allegation attempting to make any charge of wrongdoing I think, all except one, is made upon information and belief. The Irving Trust Company, it is alleged, upon demand having been made upon it to bring this suit as executor, declined to do so and the attempt is therefore made to make it a party defendant as executor. We expect the evidence here will show that the Irving Trust Company as executor is not in this case in any way. The Irving Trust Company itself has been permitted to do business here but the Irving Trust Company as executor of the estate of Herman Sielcken is not in this state or admitted to do business here. A demurrer has been filed in the Court of Common Pleas to this petition by one of the defendants, namely Franklin H. Biggs, the grounds of the demurrer are: first, that the plaintiff has not legal capacity to sue, and second, that the petition does not state facts which show a cause of action.

Judge Lloyd: When was that filed, how long ago was that?

Mr. Welles: It was filed on June 11, 1932.

Judge Lloyd: I was wondering why it had not been heard.

Mr. Welles: I may say if it is important, the evidence here will be to the effect that we offered to have it heard immediately, prior to the going forward of these depositions or the attempt to go forward with them, and that counsel representing the plaintiff said they preferred to [fol. 145] have that demurrer heard in the usual and ordinary course. We filed a brief with the court with the number of points raised in the demurrer, and filed a copy of that with counsel for plaintiff. Then, third, that there is a misjoinder of parties defendant; fourth, that there is a defect of parties plaintiff; four-a, that there is a defect of parties defendant; fifth, that separate causes of action against several defendants are improperly joined; sixth, the action was not brought within the time limit for the commencement of such an action, and seventh, that several causes of action are improperly joined. I may say we have

been and are now ready to submit that demurrer to the Court of Common Pleas at any time, and have so advised counsel for plaintiff in the court below.

Judge Lloyd: Did counsel request oral argument? Unless the rule is changed, as soon as the demurrer is filed and briefs with it, the court goes ahead and decides it on its own initiative.

Mr. Welles: There has been no brief filed on behalf of plaintiff and their time has not expired, but in the meantime, as the evidence will show, an attempt was made to go forward with these depositions. Now, in addition to the fact that, if we are correct in our position on the demurrer, the plaintiff has no legal capacity to sue and that there is no cause of action stated and that therefore there can be no material or relevant evidence of any sort obtained from any witness, therefore no witness can be required to answer any question. It further appears that, or will appear, that the notary public issued for the petitioner Bevan, who is the secretary and treasurer of The Woolson Spice Company, a subpœna duces tecum of a character which, under the authorities as we understand, constitutes an unreasonable search and seizure and which does not comply with the rule that requires reasonable description and specification of papers which it is sought to have produced by such subpœna. An example of the requirements of the subpœna is "all contracts and copies of contracts at any time entered into by you," this is in the Koehrman subpœna, "at any [fol. 146] time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company"; and skipping through, for instance, No. 5 "All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, and/or its successors and/or any of its officers, agents and directors, including George E. Warren and Willard V. King from 1916 to 1932 inclusive". Regardless of the subject matter of the correspondence it is all required to be produced. And another one, No. 8, "Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive," regardless of the subject matter of such correspondence, so that it seemed to us and we so advised Messrs.

Koehrman and Bevan, Mr. Bevan's subpœna duces tecum was of a similar character, that under the law and the Constitution that they were not required to undertake to move their files bodily up to the law office of Messrs. Fraser, Hiett & Effler, and that the subpœna so far as it attempted to require the production of the papers was, in our opinion, void and until this court or some other court would otherwise rule they need not obey it. Now, as I say, the evidence will show that we appeared specially at the taking of the deposition of Mr. Bevan and saved all of our objections to the procedure, but he nevertheless did answer some questions. Certain questions he was advised he need not answer on the grounds which I have stated here, that the petition does not state a cause of action and plaintiff had no legal capacity to sue and the other grounds stated in the demurrer, that the subpœna duces tecum was illegal and void, and, accepting that advice, he declined to answer certain questions which, even if the petition did state a cause of action, I think under the rule laid down by this court in Poe v. Mathias, would be found to be wholly immaterial, and thereupon this order of commitment was issued. We think the evidence will show that the notary issued this order of commitment in the absence of the witness Bevan, in the absence of his counsel, without notice to counsel or [fol. 147] to Bevan, without opportunity to Bevan to be heard on the question as to whether he had committed a contempt or whether he was justified in refusing to answer the questions and produce the books and the notary purported to adjudge, using that word, that Bevan was in contempt and purported to adjudge that the questions asked him were material, as shown by the commitment papers signed by the notary himself. It will, as your Honors have seen at this time be our contention that there has been a violation of the constitutional rights of these plaintiffs both under the state statutes, numerous sections of which we will point out in our argument, under the fourteenth section of the Constitution of the United States, an attempt on the part of the notary to exercise judicial power, and the evidence will show that the notary has necessarily a pecuniary interest in attempting to force these witnesses to testify before him, since he is acting not only as notary but as stenographer and will get certain fees and compensation for writing the transcripts, and therefore he is disqualified

from undertaking to decide whether this man should be put in jail, under a decision of the United States Supreme Court in the Toomey case and other similar cases. Mr. Wall has reminded me that the evidence will also show that there has been no service of summons upon Marion M. Miller, one of the defendants, and that the attempted service of summons upon the Irving Trust Company as executor is void and ineffective as service against it as executor; that there has been no service of notice of the taking of these depositions upon the defendant Marion M. Miller and no real legal service of notice of the taking upon the Irving Trust Company as executor, and that, therefore, the case has not been placed in the posture required by the statutes for the taking of depositions, even though there were nothing else involved. I perhaps did indicate, but to make it clear, the opening statement is intended to apply to all three of the pending habeas corpus proceedings, Bevan, Stranahan and Koehrman, except in so far——

Judge Lloyd: I take it the questions involved are practically the same?

[fol. 148] Mr. Welles: I practically the same. There are one or two questions in the Bevan case arising by reason of the fact that some questions were asked him that do not arise in the Stranahan or Koehrman cases, otherwise the question is the same.

Mr. Fraser: Upon the last questions, if the court please, your Honors may want to consider this question, whether or not a witness who defies an order of a notary to appear and refuses to appear, and in answer to a subpœna appeared and refused to testify, anyway, whether that witness is in a position to raise these questions which Mr. Welles suggests. The only witness appearing was Mr. Bevan. Your Honors have observed from the statement of counsel this is a case involving a charge of an unlawful conspiracy entered into, secretly of course, by the defendants for the purpose of defrauding this estate. The petition is long in an attempt to set up the facts and after the statement of legal questions the facts are there and properly there under the authorities, we believe. We believe this plaintiff has a complete right and compelte legal capacity to file and maintain this suit. How far your Honors will feel justified, in view of the decisions of this court, in examining into the technical sufficiency of this petition which

is pending in the Court of Common Pleas and in which your Honors have no original jurisdiction to examine, will be discussed later as I have suggested. So far as the facts are concerned, on the sixth day of June a proper legal notice was served of the taking of depositions upon the thirteenth, was served upon counsel for these defendants who are now trying or appearing and who acknowledged service of that notice, and who appeared on the thirteenth with a witness Bevan. They were served with summons originally in the case on the second of June. Because of the fact that certain allegations in this petition for habeas corpus, the court should be advised that upon the original notice served and original subpœnas the defendants, in order to frustrate us in the taking of depositions, applied to the Common Pleas Court for an injunction, their main contention being, as I understand, they wanted time to prepare the case, on the sixth of June. On the sixth of June an agreement was [fol. 149] made, a verbal agreement, that the depositions would be taken on the thirteenth. Thereupon new notices were served on Monday, the sixth, acknowledged and on the seventh, after service of those notices the subpœnas were served on the defendants.

Judge Lloyd: Is this suit an action for damages or a suit in equity?

Mr. Fraser: Suit in equity, I rather think it is. It is a suit with alternative relief prayed for.

Judge Lloyd: If it is a suit in equity you could have a bill of discovery.

Mr. Fraser: That is doubtful under the Fairchild case. That case deals with the other question we have here, matter of materiality and matter of properly questioning—at any rate we have a legal right under the law, statutory right to take these depositions, and we think these gentlemen have no power to nullify that right. We think the court will be satisfied that these questions put to Mr. Bevan were material on the issues as presented in the petition. The subpœna duces tecum, to illustrate, we tried through Mr. Bevan, secretary and treasurer of the company, to produce the minute book. If that is not a correct description of the book, I don't know what is. He went on the stand and testified that he did have it but had turned it over to his counsel. Where it was now he didn't know.

When he was on the stand we discovered that. Whether we will ever get the book, we don't know. We asked for the record of stock transfers, which are most material to this situation, this whole deal, as all these deals are, was concocted and carried out in the dark, with the lights all out, as these gentlemen always work, and work in secret, we wanted to find out what the minutes of this company showed, so I asked, we asked for the production of the minute book and it appears in the testimony of Bevan that there is one, but where it is we do not know, it was in his possession until the filing of this suit and he says it was turned [fol. 150] over to his counsel. We asked for the production of the record of the payment of dividends since this time when we say this stock was fraudulently acquired and transferred. We asked for the record of the company showing the transfers of stock. It is obvious that this deal or transfer had been indirect and through many hands. That is the way those things are usually done, and we are entitled to know how. This man has testified that there are such records. In the subpœna duces tecum we only have to describe the document so the witness may know what is wanted and what is meant. If there is anything in the subpœna he doesn't know and can't ascertain the identity of, that can be taken care of when it is reached. In this examination of Mr. Bevan we tried to have him produce these things designated, which are perfectly plain. No one can doubt their identity. He refused to produce them under the advice of counsel. We believe, if the court please, under the authorities this is the rule which your Honors will apply, that if there is any reasonable probability or possibility, as some of the courts say, these matters being material in this case, the court will not deny us the right to ascertain those facts, even though it does involve the cross examination of a defendant. The statute was passed for that purpose and as the Supreme Court has said in many cases, particularly in the Fairchild case, we can not be required to wait until they are satisfied the time has arrived for our finding out these facts. It is a valuable right given by the statute and we insist now it is two weeks after the filing of the petition. They have secured that much delay and we are entitled to proceed in the examination of these people and ascertain the facts and ascertain other evidence. Now, there is an allegation here for example, made

in the supplement, that Mr. Purcell is not disinterested. No answer, I think is filed, and I understand it is not necessary to file an answer. That allegation of course we challenge. They make a challenge that our effort wasn't in good faith, to take testimony. That allegation is challenged, and proof will be offered. But if your Honors' practice is to exclude evidence challenging and disproving allegations of that kind, somebody must have the right to file an answer. The suit as filed here is not plaintiff and defendant, as may be done, it is filed ex parte John Smith, ex parte Koehrman, and the sheriff produces the body and the return and shows why he is holding these men. [fol. 151] Whether the sheriff has any right—he denies this charge of bad faith, he denies the officer was not authorized.

Mr. Welles: It is agreed in the Stranahan case that Mr. Robert A. Stranahan, the petitioner, would, if called as a witness, testify that he is in good health and that he expects to be present at the trial of this case if and when the case is tried on the merits.

Mr. Fraser: We make that stipulation notwithstanding the fact that on Monday Mr. Welles said Mr. Stranahan was ill and not feeling well.

Mr. Welles: As far as I know, that is the only thing we have been able to agree upon since this trial started.

Mr. Fraser: We can agree upon this, if the court please, that no service of summons has been made on Marion Miller. He is in California, and service here was residence service only and whether it was made, I don't know.

Judge Richards: Is he a necessary party?

Mr. Fraser: No.

Judge Richards: Is the Irving Trust Company?

A. No, I think not. But they have been served. Not only that, but have entered their appearance by acknowledgment of the deposition notice.

Mr. Wall: The sheriff's return on Miller shows "not found".

Mr. Fraser: Very well.

Mr. Welles: I understand you agree there has been no service on Marion Miller, either by summons or notice to take depositions?

Mr. Fraser: Yes, sir. And depositions when taken, we concede can not be used against the man who didn't have notice, but may be used against those served. These stipu-

lations are made reserving our objections and exceptions to their materiality.

OFFERS IN EVIDENCE

Mr. Welles: Any offer of evidence as made by us is subject to our objection that there is not sufficient showing by answer or return from the sheriff showing legal custody of any of the petitioners. We do offer in evidence the petition in the case of Clara Sieleken Schwarz v. The Woolson Spice Company, and in order to avoid encumbering the [fol. 152] record further, if it is satisfactory, the copy attached to the amendments to the habeas corpus proceedings may be considered in evidence.

Mr. Fraser: It is also attached to the return of the sheriff. We do not object on the ground of identification.

Judge Lloyd: You may have your exceptions.

Mr. Welles: Without objection as to lack of certification?

Mr. Fraser: Yes.

Mr. Welles: We offer copy of the demurrer filed by defendant Franklin H. Biggs in the case of Schwarz v. Woolson Spice Co.

Mr. Fraser: Note an objection on the ground of materiality.

Mr. Welles: And marked Plaintiff's Exhibit No. 2, the petition should be marked Exhibit No. 1. In the Bevan case we offer in evidence the copy of the commitment which is attached to the petition, and which may be marked Exhibit No. 3A. We also offer the copies of the writs of attachment which are respectively attached to the petitions in the Stranahan case and in the Koehrman case, and which are marked Exhibit 3B and 3C respectively.

Mr. Fraser: The originals of those are likewise attached as a part of the sheriff's return of the writ of habeas corpus. Are those marked?

Mr. Welles: Those should be numbered in their own cases. We offer in evidence in each of the three cases Exhibit No. 3, which is a copy of the authority of the Irving Trust Company of New York to do business in the State of Ohio. If it is agreeable to counsel we will use a certified copy of it in one case and copies of that in the others.

Mr. Fraser: We are objecting to Exhibit No. 3 on the ground that The Irving Trust Company has already entered its appearance here.

(Overruled; exception.)

Mr. Welles: We also offer in evidence in each of the three cases Exhibit No. 4, which is a certified copy of the instrument filed by The Irving Trust Company with the secretary of state showing its authorized powers and the location of its office in this state and the name of its local representative, etc. We shall offer a certified copy in one case and copies of that in the others, if there is no objection.

[fol. 153] Mr. Fraser: Note our objection and exception.

Mr. Welles: We now offer in evidence in the Bevan case the subpœna duces tecum which was served on Mr. Bevan, marked "Plaintiff's Exhibit No. 7", in the Koehrman case the subpœna marked "Plaintiff's Exhibit No. 8", and in the Stranahan case the subpœna which was served on Mr. Stranahan, marked "Plaintiff's Exhibit No. 9", copies of each being attached to the original petitions for habeas corpus.

Mr. Fraser: Referring to the subpœnas served on the seventh of June?

Mr. Welles: Yes, the ones attached to the petition. No objection to the use of copies, is there?

Mr. Fraser: Not at all.

Mr. Welles: I would like to call Mr. Purcell the notary public.

Thereupon, WILLIAM PURCELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welles:

Q. Your name is William Purcell?

A. Yes, sir.

Q. Live in Lucas county, Ohio?

A. Yes, sir.

Q. Notary Public of that county?

A. Yes, sir.

Q. You are the William Purcell who issued the writ of commitment for C. N. Bevan and writs of attachment for Robert Stranahan and Koehrman?

A. I am.

Q. In the case of Schwarz v. Woolson Spice Company?

A. Yes, sir.

Q. Were you employed by somebody to act as notary and take or attempt to take depositions?

A. Yes, sir.

Q. Who employed you?

A. The firm of Fraser, Hiett, Wall and Effler directly.

Q. The same firm who are of counsel for Clara Sielcken Schwarz in the case mentioned?

A. Yes, sir.

[fol. 154] Q. Is it a fact that you originally signed subpœnas for Mr. John W. Koehrman and Mr. C. N. Bevan and Mr. Stranahan, directing them to appear before you to give testimony and produce books and papers, at a time when no petition in the case of Clara Schwarz v. Spice Company had been filed?

(Objection.)

Mr. Fraser: The notice which they acknowledged was upon the sixth of June, there was an earlier notice served on the day the case was filed, which was questioned before Judge Gosline on the sixth of June and at that time new notices were drawn and served.

Mr. Welles: I thought in view of some of the things Mr. Fraser had said about the history in the Court of Common Pleas——

Judge Lloyd: I don't think we are getting on——

Mr. Welles: Very well. Did you receive from anybody any acknowledgment or proof of service of notice of the taking of depositions before you set for June 13, 1932, in the cause of Schwarz v. Woolson Spice Company?

A. Yes sir.

Q. Do you have that with you?

A. No, sir.

Q. Do you have it there, Mr. Fraser?

Mr. Fraser: Yes.

Mr. Welles: May I see it. Now, Mr. Purcell, I show you a paper marked Plaintiff's Exhibit No. 6, is that the acknowledgment of service of notice of the taking of depositions just referred to by you?

A. Yes, sir.

Q. Have you any other acknowledgment of service of notice than that, referring to the June 13th proceedings?

A. No, sir.

Q. You have no return of service of notice of the taking of these depositions upon Irving Trust Company, executor?

A. None other except just this.

Q. Or upon Marion M. Miller?

A. No, sir.

Q. Neither one?

A. No sir

Q. Have you any acknowledgment or proof of return or service of this notice or any notice upon Mitchell and Eastman? (No answer.)

[fol. 155] Q. Mr. Purcell, I show you a copy of the subpœna duces tecum, which is attached to the original petition for writ of habeas corpus filed by C. N. Bevan, is that a copy of the subpœna duces tecum issued by you for Mr. Bevan?

A. I can't tell, Mr. Welles.

Q. Have you produced the original Bevan subpœna signed by you?

A. It wasn't given to me, sir. It was introduced in evidence. It was referred to but not marked as an exhibit at the taking of the deposition.

Q. Was it left in your possession?

A. No, sir.

Q. I show you paper marked Exhibit No. 7, is that the original subpœna signed by you for Mr. Bevan?

A. Yes, sir.

Q. Dated the seventh of June?

A. Yes, sir.

Q. Did you prepare that subpœna, or did counsel for plaintiff prepare it?

A. Counsel prepared it.

Q. Counsel prepared it for you?

A. Yes, sir.

Q. I show you the commitment addressed to Joseph Zimmerman, sheriff directing him to arrest and commit C. N. Bevan to the jail of Lucas County, being a paper which is attached to the sheriff's return in the Bevan case, did you sign that commitment?

A. Yes, sir.

Q. Did you give Mr. Bevan any notice before you signed it that you were going to sign it?

(Objection; overruled; exception.)

A. No, sir.

Q. Did you give counsel for Mr. Bevan any notice that you were to sign a commitment for Mr. Bevan?

(Objection; overruled; exception.)

A. Yes, sir.

Q. Isn't what you said this: that if a commitment was presented to you, you would sign it?

A. No, Mr. Welles, I believe I said that I was going to sign one but I didn't think I would get it into the hands of the sheriff before morning.

Q. You gave counsel for plaintiff no notice of the time and place when you were to sign the commitment?

A. Counsel for plaintiff?

[fol. 156] Q. Counsel for Bevan?

A. Not of the exact time.

Q. Nor of the place? Now, in your commitment appears the following: "As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a notary public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a notary public, then and there for the said contempt of the said C. N. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the county jail until he submit to testify in the premises." Now, isn't it a fact, Mr. Purcell, that at the time Mr. Bevan was present at the taking of his deposition, at the time he refused to answer questions, that you then and there adjudged that he was in contempt and ordered that he be committed?

(Objection; overruled.)

A. No, sir, I didn't at the exact moment.

Q. It was some hours later that you signed this commitment, wasn't it?

A. It was immediately at the conclusion of the taking of the depositions that commitments were decided upon and gotten up.

Q. It was some hours after Mr. Bevan had left the office before you signed this commitment?

A. Yes, sir.

Q. And you had no hearing, heard no arguments, received no evidence on the question as to whether Mr. Bevan was in contempt or whether he had any justification or reasonable ground for refusing to answer?

(Objection; overruled; exception.)

A. No, sir.

Q. You served upon Mr. Bevan no notice, either verbal or in writing, of any charge which you were making against him, before you signed this order for his commitment?

(Objection; overruled; exception.)

A. No, sir.

[fol. 157] Mr. Fraser: May I have objections and *objections*, without interrupting?

Judge Lloyd: Yes, you may.

Mr. Welles: Your commitment further reads: "The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A"; did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues?

A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case?

A. Yes, sir.

Q. Are you a lawyer?

A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case?

A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right?

A. Yes, sir.

Q. I show you paper marked Plaintiff's Exhibit No. 8, is that the original subpœna signed by you under date of June 7th for John W. Koehrman?

A. Yes, sir.

Q. It is a fact that because Mr. Koehrman did not appear before you on June 7th that you then signed and delivered to the sheriff a writ of attachment, the original of which appears as a part of the sheriff's return?

(Objection; overruled; exception.)

A. No, sir.

Q. At whose request did you sign the writ of attachment for Mr. Koehrman, which is a part of the sheriff's return?

A. At the request of Mr. Fraser.

Q. What was the reason for signing it?

A. Because he didn't appear on the thirteenth day of June.

[fol. 158] Q. Is it a fact, Mr. Purcell, that on the morning of June 13, 1932, after you had undertaken to begin these depositions, that I stated before you, as shown by your transcript, without waiving any rights or submitting themselves to the jurisdiction of the notary, Mr. Koehrman will come over here and meet with you gentlemen whenever you are through with Mr. Bevan, who is now here?

A. Yes, sir.

Q. And was there, to your knowledge, any request thereafter made that Mr. Koehrman should come over that afternoon?

A. There was a request made that I issue an order of attachment immediately for Mr. Koehrman.

Q. You issued the order of attachment immediately upon that statement being made?

A. At the conclusion of the depositions.

Q. You didn't issue it right that morning, then?

A. Yes, sir.

Q. You didn't issue it right that morning then?

A. Yes, sir. As soon as we took the recess until afternoon.

Q. You issued the attachment for Mr.——

A. I am sure the attachment was in the hands of the sheriff before eleven thirty a. m.

Q. As far as you know, no further request was made that Mr. Koehrman should come there, except as you un-

dertook to enforce his attendance by this writ of attachment?

A. Yes, sir.

Q. Is this Exhibit No. 9 the subpœna which you issued for Robert A. Stranahan?

A. It is one of the subpœnas.

Q. That is the one dated June 7th?

A. Yes, sir.

Q. Is the writ of attachment which is attached to the sheriff's return and marked Plaintiff's Exhibit No. 10 in the Stranahan case here, is it the one which you issued for the arrest of Mr. Stranahan?

A. Yes, sir.

Q. We offer in evidence each and all of the exhibits which have been called to the attention of Mr. Purcell, making an offer of each one separately.

(Objection; exception.)

Q. You were employed not only as a notary public but [fol. 159] also as a stenographer in the taking of these depositions of these three men whose petitions for habeas corpus are here, were you not?

A. Yes, sir.

Q. And you were acting as both notary and stenographer?

A. Yes, sir.

Q. Is it a fact that the amount of your compensation as a stenographer taking these depositions is dependent upon the number of pages of your notes which you transcribe and deliver to counsel for plaintiff?

A. Dependent upon the number of pages which we transcribe and deliver to all counsel.

Q. To any counsel, including counsel for the plaintiff?

A. Yes, sir.

Q. Do you receive any per diem as notary from counsel?

A. No, sir.

Q. Have no arrangement of that sort?

A. No, sir.

Q. Your compensation is contingent on the extent to which they testify before you?

A. Yes, sir.

Q. And the extent to which you transcribe the testimony, including the exhibits?

A. Yes, sir.

Q. And your employment as stenographer was by Messrs. Fraser, Hiett, Wall & Effler?

A. Yes, sir.

Q. In the taking of these depositions, I mean?

A. Yes, sir.

Q. What is your rate of compensation per page of typewritten transcripts of depositions or exhibits?

A. Based on the number of words. Twenty-five cents a hundred words, based on the statute.

Q. For the original copy?

A. Yes, sir.

Q. And you make a charge for furnishing carbons?

A. Yes, sir.

Q. What rate?

A. The party ordering the original pays for their carbon copy ten cents a folio and opposing counsel pays fifteen cents.

Q. Were you in fact directed by Mr. Fraser or one of his firm to prepare an original typewritten transcript of these depositions?

A. I was directed to transcribe the testimony.

[fol. 160] Q. In typewriting?

A. Yes, sir.

Q. And to deliver how many copies to his office?

A. Deliver one carbon to his office and one carbon to Mr. Jackson.

Q. What were you to do with the original?

A. The original I took it for granted is to be kept in my office until signed and filed.

Cross-examination.

By Mr. Fraser:

Q. Mr. Purcell, before this morning, at any time in the proceedings, was any objection made by counsel for these defendants to your competency or qualifications?

A. Not to me.

Q. In your hearing?

A. Not that I know of.

Q. At the time of the taking of the testimony was anything said by Mr. Welles or any of counsel for defendants

in any way questioning your qualifications or fairness or ability?

A. No, sir.

Q. In addition to employment by us to transcribe this testimony, were you also employed by counsel for the defendants to furnish them certain copies?

A. Yes, sir.

Q. Has that been done?

A. Yes, sir.

Q. Except to be paid by them for these copies?

A. Yes, sir.

Q. Practice in the taking of depositions is this, is it not, a deposition is taken and certain fees are taxed for the taking of the original?

A. Yes, sir.

Q. And returned and taxed as costs in the case and in many instances the counsel calling you advance those costs to you?

A. Yes, sir.

Q. Has that been the universal practice?

A. Yes, sir.

Q. How long have you been engaged in this work?

A. Sixteen years.

Q. Before issuing any of these writs of arrest or commitment, did you or did you not consult one of the judges of the Common Pleas Court of this county?

A. Yes, sir.

[fol. 161] Q. Which judge?

A. Judge Gosline.

Q. Were the writs issued after consultation with him?

A. Yes, sir.

Q. At the time that you were shown and had knowledge, personal knowledge of the original deposition notice served upon and acknowledged by Tracy, Chapman & Welles, were you told by me that service was also being made upon the Irving Trust Company's agent in Toledo?

A. Yes, sir.

Q. Were you also told that the original notice would be in the mail the next day?

A. I don't recall that.

Q. You never have seen that original notice?

A. No, sir.

Q. Acknowledged by them?

[fol. 162] Redirect examination.

By Mr. Welles:

Q. You don't mean that you filed any formal application with the Court of Common Pleas for instructions or advice as to whether you should issue these writs of attachment or commitment?

A. No, sir.

Q. You didn't give counsel for defendant an opportunity to be heard and present any views they had as to why attachment or commitment should not issue?

A. No, sir.

Q. You simply went over and told Judge Gosline in substance that Mr. Fraser had asked you to issue writs of attachment or commitment or both and that because there was an application for injunction pending before him you wanted to find out whether it was all right to issue such writ?

A. In substance, that is it.

Q. He said, in substance, that the mere pendency of the application did not amount to one and you were at liberty to perform whatever your duties were in the premises?

A. Yes, sir.

Judge Williams: Was an attachment issued for the two witnesses who did not appear?

A. Yes, your Honor.

Q. And arrested under the writ of attachment?

A. Yes, your Honor.

Witness dismissed.

Mr. Welles: May it be conceded that Mr. Bevan, if called as a witness, would testify that he is in good health and expects to be present at the trial of the case of Clara Sieleken Schwarz v. The Woolson Spice Company in the Court of Common Pleas if and when it is tried, and resides in this county.

Mr. Fraser: Yes, I think he will testify to the same subject matter in his deposition, of course with our reservation of objection.

Mr. Welles: And the same thing as to Mr. Koehrman?

Mr. Fraser: Yes, with the same reservation.

Mr. Welles: We offer in evidence the several stipulations with respect to what the petitioners would testify to on these subjects.

[fol. 163] Mr. Fraser: Mr. Welles, will you stipulate that the young man who served this notice would testify that it was served upon Mr. Dexter, the man who appears to be the authorized agent of the Irving Trust Company?

Mr. Welles: You say you have a letter saying this was handed to Mr. Dexter?

Mr. Fraser: I have a statement over the telephone that this was served upon Mr. Dexter and he signed it, placed his signature on there acknowledging service.

Mr. Welles: I think we ought to have him here.

Mr. Fraser: I will make my professional statement that as soon as we can we will call him, bring evidence to show that. Mr. Welles, you don't question the signature of your firm appearing upon the original notice?

Mr. Welles: No.

Mr. Fraser: Exhibit No. 6.

Mr. Welles: No.

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Thereupon Raymond T. Jackson, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. Your name, please?

A. Raymond T. Jackson.

Q. You are a lawyer, Mr. Jackson?

A. Yes, sir.

Q. Member of what firm?

A. Member of the firm of Baker, Hostetler, Sidlo & Patterson of Cleveland.

Q. Their offices in the Union Trust Building?

A. Yes, 1956 Union Trust Building, Cleveland, Ohio.

Q. Have you been active in the preparation and filing of this law suit?

A. I have.

Q. And did you take part in the preparation of the various notices and subpœnas for depositions in this case?

[fol. 164] A. Well, I was in contact with the preparation and was asked to see that the notices be prepared. As far

as our firm was concerned the work was physically done by Mr. Morley in cooperation with your office.

Q. Are you in a position to testify whether or not these depositions are being taken in good faith or in bad faith?

(Objection; overruled; exception.)

A. I am.

Q. What is the fact?

(Objection; overruled; exception.)

A. The depositions are being taken in good faith.

Q. What is the fact as to whether or not they will or will not be used in the trial of this Schwarz case?

(Objection; overruled; exceptions.)

A. Depositions are being taken with the intention that they shall be transcribed and filed in the Common Pleas Court of this county and that the depositions will be used by the plaintiff if any occasion under the statute should arise which will permit their use and if the witnesses, particularly those called for cross examination under the statute, testify to the truth.

Cross-examination.

By Mr. Welles:

Q. Mr. Jackson, it is a fact, is it not that the proposition has been made to you several times by counsel for certain of the defendants, including the three petitioners here, that you should agree that the demurrer in the Court of Common Pleas should be first heard before a deposition should be taken, so that we might know whether there is any right on anybody's part to take anybody's deposition?

A. I don't know whether any proposition of that kind exactly was made. I can state the facts as I understand [fol. 165] them, if you want me to do it.

Q. I would like to have you state whether, in substance, the suggestion was not made that we should hear the demurrer before taking the depositions?

A. I will say this, that counsel for the defendants sought an agreement to postpone the taking of the depositions until——

Mr. Welles: I object to his rambling around here and go into an irrelevant controversy in which he can make this speech he is trying to make.

A. A suggestion was made.

Q. You say it was made, a suggestion was made by me to you?

A. Yes.

Q. And declined by you?

A. That is right.

Q. And is it not a fact that we stated to you that we were willing to submit that demurrer immediately, at any time suiting the court's convenience and your convenience?

A. You so stated yesterday to me, Mr. Welles.

Q. Didn't we say, so state, at the time we were before Judge Gosline that we were intending to file a demurrer which we would submit?

A. You stated you intended to file a demurrer before Judge Gosline on June 6th and that you would be glad to expedite the hearing of the motion when and if it should be filed.

Q. It is a fact, is it not Mr. Jackson, that you first attempted to take these depositions by means of serving with the summons a notice to take depositions?

A. Well, they were served the same day. My understanding is that the summons were served first, I wasn't there.

Q. But they were entrusted to the sheriff to be served at or about the same time?

A. My understanding is that after the summons had been issued in the suit and delivered to the sheriff of this county, he was then given notice of taking depositions and certain subpœnas and directed to serve them in a certain way, first [fol. 166] the summons and then the notices and then the subpœnas. I wasn't here but that is my understanding.

Q. They were to be served upon the defendants direct, not upon counsel?

A. That is right, no counsel had appeared for them Mr. Welles.

Q. And they were served with or at approximately the same time, the subpœnas duces tecum, on the witnesses Bevan and Koehrman?

(Objection.)

Q. In order to shorten the thing, may it be admitted that the first attempt to take depositions in this case by plaintiff consisted of causing to be served upon certain of the defendants on the same day the summons was served upon those defendants, a notice to take depositions, service being made upon the second of June and notice to take depositions for the sixth of June, and that upon Bevan and Koehrman there were served by the sheriff at or about the same time, at least on the same day, subpœnas duces tecum for the production of books and papers before the notary on June 6th.

Mr. Fraser: If that stipulation includes the service on the Irving Trust Company in substantially the same way, yes. I understand the order was first, service of summons upon the resident defendants, then notices to take depositions and in the instance of Mr. Bevan, who is not a defendant, he was served with a subpœna duces tecum after the summons on the defendants had been served and notices to take depositions. In Koehrman's, he was served first with summons, then with notice to take depositions, then with a subpœna duces tecum. This stipulation is made with the reservation.

Mr. Welles: There is no stipulation, then, because Mr. Fraser's additional language is quite contrary with what has been found in the Court of Common Pleas, and we can not agree with it. We will be glad to have the sheriff called and present the exact facts, but we do not think it is material.

[fol. 167] Judge Lloyd: And we agree with you.

Mr. Fraser: Mr. Jackson, referring to the cross examination with respect to any agreement made on June 6th with respect to hearing or taking depositions and filing and hearing of the demurrer, tell the court the substance of that talk?

(Objection; overruled; exception.)

A. On June 6th at the hearing before Judge Gosline it was suggested that the hearing of that pending motion be continued, and asked counsel if they could not agree on some method of going forward and in talking with Mr. Welles after the suggestion from Judge Gosline, I stated that we would be willing to postpone the consideration of

the pending matter and go forward on the following Monday, June 13th, taking the depositions at Mr. Fraser's office that date having been suggested in conference by Judge Gosline. Mr. Welles asked for some time to confer with some one and then told me that that date would be acceptable and that no objection would be made that any demurrer was pending if the one should be filed, or any exceptions taken to the taking of the depositions, and with that conversation we said we would issue the new subpœnas and notices which are the ones involved in this proceeding.

Motion to strike out answer as irrelevant, overruled, exception.

[fol. 168] Thereupon GEORGE D. WELLES testified as follows:

Mr. Wall: Will you state the substance of the conversation between you and Mr. Jackson on June 6th, regarding the time of taking the depositions?

A. Judge Gosline suggested a recess, and then invited us into his room and suggested we agree upon some date for taking these depositions. He finally said it ought to go about a week, he thought. I told him, and Mr. Jackson was present, that we would consider it and let him and Mr. Jackson know. We did consider and consult and my arrangement with Mr. Jackson was this. I said to Mr. Jackson, in substance, that obviously we must preserve any rights we had to object to these depositions, but whether there was a delay or whether there was not a delay, we would waive no rights, we were going to rely upon every right we had and expected to file a demurrer, and that we expected to rely upon the fact that there was a demurrer pending. Mr. Jackson said to me, in substance, "Does that mean you will object to the witnesses testifying at all, that you won't let them testify at all on the ground you have a demurrer pending?" and I said we wouldn't waive that objection, but these two witnesses, Koehrman and Bevan will appear and will submit to answering some questions, what questions or how many I wouldn't now say, but we shall reserve all rights. I afterwards went back to Mr. Jackson, before we went, a moment or two afterwards, and said to him I didn't want any misunderstanding about this,

"I want you to understand we will waive no objection that we have."

Mr. Fraser: My statement as to what occurred there is in the depositions and on file. I don't think it is at all material.

Mr. Welles: If Mr. Fraser's statement is considered, I want Mr. Wall's statement considered also, if it is to be material.

Thereupon the court recessed for the noon hour, to reconvene at 1:30 o'clock p. m.

Mr. Welles: With the court's permission we would like [fol. 169] to reopen our evidence for the purpose only of offering one New York Court of Appeals decision and a section of the New York statutes which we think bear upon the subject.

Judge Lloyd: Very well, you may put it in.

Mr. Fraser: Subject to our objection.

Mr. Welles: Your objection isn't because we are not proving the New York statute by some New York attorney?

Mr. Fraser: No.

Mr. Welles: We offer in evidence the opinion of the Court of Appeals of New York in the case of Harrington, Admr., etc., respondent, v. Eugene M. Keteltas, et al., appellants, 92 New York, beginning at page 40 and ending on page 50, called Exhibit No. 11, and we also offer from the New York Civil Practice, Cahill, 1927, the following subsection 5 of Section 20 of the Surrogate's Court Act.

Mr. Fraser: Objection and exception.

Mr. Welles: You aren't objecting to the manner of proof?

Mr. Fraser: No.

Mr. Welles: "The Surrogate in or out of court as the case may be has power: 5. To require by order an executor, administrator, testamentary trustee or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute or by the surrogate's court under authority of the statutes."

Thereupon Raymond Adamski, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. What is your name, please?
A. Raymond Adamski.
Q. Where do you live?
A. 2601 Tate Avenue, Cleveland, Ohio.
Q. Are you employed somewhere?
A. Yes, sir.
Q. Where?
A. Law firm of Baker, Hostetler, Sidlo & Patterson.
[fol. 170] Q. What is your job?
A. Messenger.
Q. How long have you been there, how long have you worked there?
A. About a year and a half.
Q. Raymond, I show you paper which has been marked Defendants' Exhibit No. 1 in this case, did you ever see that?
A. Yes, sir.
Q. In connection with your work in Cleveland? Where did you first see it?
A. Mr. Morley handed it to me and told me to serve it on Mr. John Dexter.
Q. How many copies did he give you?
A. One original and one copy.
Q. Where did you go with them?
A. To the Society for Savings Bank Building.
Q. Whom did you inquire for?
A. I went to the guard at the Society for Savings Bank and asked for Mr. John Dexter. He told me there was a bank meeting and he would not be back until twelve, so I waited until about 12:15 and decided I would go to lunch and come back and catch him in, and I came back, I think it was about one o'clock, and I was just a few minutes late, he had gone out to lunch, and I went back and told Mr. Morley and said I would stop in and catch him on my way to court, and I went to his office then and the guard told me he was in and he pointed Mr. Dexter out to me and told me to go right over to him, so I went over to him and handed him the papers. At first I addressed him as Mr. Dexter, is this Mr. Dexter and he said yes and I handed

him the papers. He looked them over and examined them and I told him to sign the copy and keep the original.

Q. Did he sign the copy?

A. Yes, sir.

Q. Did you see the name, J. H. Dexter; was that put on in your presence, Raymond?

A. Yes, sir.

Q. By whom was it signed?

A. By John H. Dexter.

Q. Was that all that occurred at that time?

A. Yes, sir.

Q. You left with him the original?

A. Yes, sir.

Q. And brought this with you and returned it to the office?

A. Yes, sir.

[fol. 171] Q. Since serving that paper, have you taken any steps to be more sure that it was Mr. Dexter who signed the paper?

A. Mr. Reeder took me down yesterday afternoon and introduced me to Mr. Dexter and it was the same man I served. He admitted it and said "Are you the young man who served the papers?" and I said I was.

Witness dismissed.

COLLOQUY

Mr. Fraser: There are three papers I wanted marked as exhibits. If your Honors please, I offer in evidence a copy of Exhibit No. 4, being the original summons and return of the sheriff of Cuyahoga county of service upon the Irving Trust Company. For the sake of the record, if one is to be made, we desire to substitute a copy. And Defendants' Exhibit No. 3, which is a certified copy of the annual report returned to the Tax Commission of Ohio by the Irving Trust Company for 1931, certified over the signature of the secretary.

(Objection; overruled; exception.)

Mr. Fraser: And Defendants' Exhibit No. 2, which is a certified copy of the report rendered by the Irving Trust Company to the same body for the year 1932.

(Objection; overruled; exception.)

Mr. Welles: On the hearing yesterday, as I recall it, early in Mr. Purcell's examination I asked him in substance whether it wasn't a fact that he had signed the first set of subpœnas for the witnesses before the petition had been filed or any summons served, that is those calling for their appearance on June 6, 1932, and the court at that time ruled that that was immaterial and I don't think I made an offer to prove. I should like to offer to prove that if permitted to answer he would say he signed these subpœnas before the petition was filed or summons issued.

Judge Lloyd: If I remember correctly, you stopped by saying you didn't think it was material and as I remember I said we agreed with you, and with that it was dropped. We want you to have in whatever you think you should have in here.

[fol. 172] Mr. Welles: Perhaps counsel can stipulate.

Mr. Fraser: Reserving our objection to the materiality, we stipulate that he would so testify.

Mr. Welles: And it is agreed that any evidence offered by either side in any one of the three cases shall be considered as having been offered in all three cases.

Mr. Fraser: Subject to the same objections.

Plaintiff and defendant rest.

The foregoing, together with the exhibits hereto attached, namely, Plaintiff's Exhibits Nos. 1, 2, 3, 3a, 3b, 3c, 4, and 6 to 11, inclusive, and Defendants' Exhibits Nos. 1 to 4, inclusive (no exhibit being numbered 5 and no exhibit number 5 being offered by either party or received in evidence), contains all the evidence given, offered or received by the court on the trial of the above-entitled action and proceedings.

Thereafter on the twenty-second day of June, 1932, the court found and adjudged in favor of the defendant and respondent, Joseph Zimmerman, as sheriff of Lucas county, and against the petitioner, and ordered the writ of habeas corpus issued herein discharged and the petitioner remanded to the custody of the respondent, to all of which petitioner in open court objected and excepted. Within three days thereafter petitioner filed in this court his written motion for a new trial of this cause, for the reasons therein set forth. Said motion having thereupon come on for hearing and having been argued and submitted to the court, was overruled by the court; to which action and or-

der of the court overruling his said motion, petitioner in open court, duly excepted.

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ORDER SETTLING BILL OF EXCEPTIONS

And now comes the petitioner, by his counsel, and presents to the court this, his bill of exceptions, taken at said trial of said cause, and prays that the same may be settled, allowed, signed and sealed by the court, and ordered made a part of the record in said cause; all of which is accordingly done on the twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges, Court of Appeals.

[fol. 173] Received this bill of exceptions on this twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges, Court of Appeals.

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[fol. 174] STATEMENT RE PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company et al., defendants) appears in full at pages 110 to 131, supra, in this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

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[fols. 175 & 176] PLAINTIFF'S EXHIBIT 2

IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

DEMURRER OF THE DEFENDANT FRANKLIN H. BIGGS

Now comes the defendant Franklin H. Biggs and demurs to plaintiff's petition on the ground that it appears on its face:

1. That the plaintiff has not legal capacity to sue;

2. That the petition does not state facts which show a cause of action;

3. That there is a misjoinder of parties defendant;

4. That there is a defect of parties plaintiff;

4-a. That there is a defect of parties defendant;

5. That separate causes of action against defendants are improperly joined;

6. That the action was not brought within the time limited for the commencement of such actions;

7. That several causes of action are improperly joined.

Marshall, Melhorn, Marlar & Martin and Tracy, Chapman & Welles, Attorneys for said Defendant.

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[fols. 177 & 178] PLAINTIFF'S EXHIBIT 3

"Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930." Omitted in printing.

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[fol. 179] PLAINTIFF'S EXHIBIT #3A

(Notary's Order of Commitment of C. N. Bevan)

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PLAINTIFF'S EXHIBIT #3B

(Notary's Writ of Attachment of Robert A. Stranahan)

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PLAINTIFF'S EXHIBIT #C

Plaintiff's Exhibit #3C (Order of attachment of appellant, John W. Koehrman) appears in full at pages 105 to 106, supra, of this Transcript and is here incorporated by reference thereto as fully as though repeated verbatim.

[fols. 180-184] PLAINTIFF'S EXHIBIT 4

"Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Section 178 and 183." Omitted in printing.

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[fol. 185] PLAINTIFF'S EXHIBIT 6

STATE OF OHIO,
Lucas County:

COURT OF COMMON PLEAS

No. 131,925

CLARA SIELCKEN SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

Notice to Take Depositions

The defendants will take notice, that on Monday the 13th day of June, A. D. 1932, the plaintiff above named, will take the depositions of sundry witnesses to be used as evidence on the trial of the above cause, at the office of Fraser, Hiett, Wall and Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, between the hours of nine-thirty (9:30) o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

June 6, 1932. Dated June 6, 1932.

Fraser, Hiett, Wall & Effler, Attorneys for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said deposition may be taken, is hereby waived.

Tracy, Chapman & Welles, Attorneys for The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan.

STATE OF OHIO,
County of Lucas, ss:

R. B. Swartzbaugh, being first duly sworn, says that on Monday, June 6, 1932, at about two thirty o'clock P. M., he served a copy of the within deposition notice upon Mr. Leroy Eastman, one of the Administrators of the Estate of William A. Brigham, deceased, and a member of the law firm of Smith, Baker, Effler and Eastman, which firm are attorneys for Ammi F. Mitchell and Leroy Eastman, Administrators of the Estate of William A. Brigham, deceased.

[fol. 186] Mr. Eastman acknowledged service of notice verbally but declined to do so in writing, and declined to enter any appearance.

(Signed) R. B. Swartzbaugh.

Sworn to before me and subscribed in my presence this 7th day of June, 1932. (Signed) L. A. Wilhelm, Notary Public, Lucas County, Ohio. (Notarial Seal.)

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[fol. 187] PLAINTIFF'S EXHIBIT #7

(Subpœna duces tecum served upon C. N. Bevan.)

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PLAINTIFF'S EXHIBIT #8

Plaintiff's Exhibit #8 (subpœna duces tecum served upon appellant, John W. Koehrman) appears in full at pages 103 to 104, supra, of this Transcript, and is here incorporated by reference thereto, as fully as though repeated verbatim.

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PLAINTIFF'S EXHIBIT #9

(Subpœna served upon Robert A. Stranahan.)

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PLAINTIFF'S EXHIBIT #10

(Notary's writ of attachment of Robert A. Stranahan.)

PLAINTIFF'S EXHIBIT #11

(Opinion of Court of Appeals of New York in the case of George C. Harrington, Administrator, vs. Eugene M. Keteltas, et al., 92 N. Y. 40.)

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[fol. 188] DEFENDANT'S EXHIBIT 1

THE STATE OF OHIO,
Lucas County, ss:

IN THE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF LUCAS AND STATE OF OHIO

Case No. 131,925

CLARA SIELCKEN SCHWARZ, Plaintiff,

against

THE WOOLSON SPICE COMPANY et al., Defendants

The defendant, Irving Trust Company, Executor, will take notice, that on Monday, the 13th day of June, A. D., 1932, the above named plaintiff will take the depositions of John W. Koehrman, C. N. Bevan, Robert A. Stranahan, Frank D. Stranahan and sundry witnesses to be used as evidence on the trial of the above entitled cause, at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, in the City of Toledo, County of Lucas and State of Ohio between the hours of 9:30 o'clock A. M. and 8 o'clock P. M., of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Baker, Hostetler, Sidlo & Patterson, Attorneys for Plaintiff.

I acknowledge service of the above notice, by copy, this 7th day of June, A. D., 1932.

J. H. Dexter, Agent for Defendant, Irving Trust Company, Executor.

[fols. 189-191] DEFENDANT'S EXHIBIT 2

"State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York." Omitted in printing.

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[fols. 192-194] DEFENDANT'S EXHIBIT 3

"State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York." Omitted in printing.

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[fol. 195] DEFENDANT'S EXHIBIT 4

THE STATE OF OHIO,
Lucas County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify Irving Trust Company, a foreign corporation as executor of the last will and testament of Herman Sielcken, deceased, that it has been sued by Clara Sielcken-Schwarz in the Court of Common Pleas of Lucas County, and that unless it answers by the second day of July, 1932, the petition of said plaintiff against it filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the thirteenth day of June, A. D. 1932.

Witness Geo. E. Hardy, clerk of our said court, and the seal thereof hereto affixed, at Toledo, this second day of June, A. D. 1932.

Geo. E. Hardy, Clerk. M. E. Theuerkauff, Deputy Clerk.

THE STATE OF OHIO,
Cuyahoga County, ss:

Received this writ June 2, 1932, and pursuant to its command, on the second day of June, 1932, at 2:20 p. m. I served the defendant, Irving Trust Company, a foreign corporation, as executor of the last will and testament of

Herman Sielcken, deceased, by delivering to John H. Dexter, the duly authorized and designated managing agent of said defendant within this state, and the person duly authorized and designated as provided by law upon whom process against said corporate defendant may be served within this state, a copy of the summons with all endorsements thereon.

John M. Sulzmann, Sheriff. Jas. M. Gallagher, Deputy.

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[fol. 196] In Court of Appeals of Lucas County, Ohio

C. A. No. 2691

Ex Parte C. N. Bevan

C. A. No. 2692

Ex Parte John W. Koehrman

C. A. No. 2693

Ex Parte Robert A. Stranahan

In Habeas Corpus

June 22nd, 1932.

Messrs. Tracy, Chapman & Welles and Messrs. Marshall, Melhorn, Marlar & Martin for petitioners.

Messrs. Fraser, Hiett, Wall & Effler and Messrs. Baker, Hostetler, Sidlo & Patterson for respondents.

Opinion

Williams, J.:

These actions, founded on applications for writs of habeas corpus, are brought to secure the discharge of certain witnesses who were committed by a notary public for refusing to appear and to produce certain books and for refusing to testify in the taking of depositions in an action for equitable relief brought by Clara Sielcken-Schwarz, plaintiff, against The Woolson Spice Company and other defendants in the court of common pleas of Lucas County,

Ohio. The petition in that cause was filed June 2, 1932 and summons was issued and served upon all of the defendants except Marion A. Miller, who could not be found within the county. On the same day, notice of taking depositions on behalf of plaintiff was served upon the same defendants, but no depositions were taken under this notice. A new notice was served upon the same defendants on June 6th, 1932, for the taking of depositions on June 13, 1932. Subpœnas to appear and testify and produce certain books and records were served upon the petitioners Bevan and Koehrman, and a simple subpœna upon the petitioner Stranahan. Bevan appeared on June 13, 1932 and answered a few questions, but refused to answer others. He further refused to produce books and records described in his subpœna. Both Koehrman and Stranahan disobeyed [fol. 197] the subpœnas and failed to appear. For contempt in refusing to answer questions and in refusing to produce books, papers and documents, the notary public ordered that Bevan be imprisoned in the county jail until he should submit to testify, and he was held in custody under this order of the notary at the time he sued out the writ of habeas corpus. Attachments were issued for Koehrman and Stranahan and they were arrested and held thereunder at the time the writs of habeas corpus were sued out for their release.

Many reasons are presented why the petitioners should be discharged, and we will discuss these questions in their order.

In the first place it is contended that the questions asked the witness Bevan were not material. In the action brought in the court of common pleas the plaintiff charged certain of the defendants with conspiring to fraudulently acquire the stock of Herman Sielcken in The Woolson Spice Company at a price far below its true value by wrongfully ousting him as president during his temporary stay in Germany and unlawfully causing the stock to be sold. Many of the questions put to the witness Bevan, which he refused to answer, were proper and material, and well calculated to elicit testimony tending to prove the allegations of the petition, and the books and records required to be produced by the subpœna duces tecum served upon him would undoubtedly, if produced, have a material bearing on the matters

under inquiry. This contention is therefore not well-founded.

It is also contended by petitioners that the petition filed in the common pleas court does not state a cause of action and the plaintiff does not have legal capacity to sue. As to the sufficiency of the petition, that is properly a question for the determination of the court in which the action is pending. However, in our judgment, depositions may be taken as a rule even though the petition does not state a cause of action, for it is not necessary that there should be an existing, as distinguished from a potential, issue of fact. It has even been held that they may be taken while error proceedings are pending in the reviewing court. [fol. 198] Fairchild v. Lake Shore Electric Railway Co., 101 Ohio St., 261.

As to the legal capacity of plaintiff to sue, there are numerous authorities to the effect that where a personal representative of the decedent's estate refuses to bring an action for the collection of assets, an heir or devisee may bring the action and make the personal representative a party defendant.

24 C. J., 797, Sec. 1981;
11 R. C. L., 262, Sec. 297;
See annotations in 22 L. R. A., 458 and
20 Amer. & Eng. Anno. Cases, 96.

The subpœnas duces tecum did not require the production of private and privileged papers, so far as the evidence discloses, and were not so indefinite that the parties upon whom they were served were justified in entirely ignoring them, nor is it a justification for refusing to obey a subpœna or to give testimony that witnesses are in good health and expect to be present at the trial.

In re Berger, 13 Ohio App., 206; affirmed 101 Ohio St., 512;
14 Ohio Jurisprudence, 10, Sec. 5;
Mathias vs. Poe, 20 Court of Appeals Opinions, Sixth District, unreported, 276.

The evidence adduced on hearing in this court shows that the depositions were being taken in good faith and we can not say that there was any ulterior motive or improper purpose in taking them. Section 11526, G. C., gives either

party the right to commence taking testimony by deposition at any time after service upon the defendant, and this right has been recognized by our Supreme Court and no party should be deprived of it without good cause.

In re Rauh, 65 Ohio St., 128.

The petitioners also make the novel contention that in attempting to punish for contempt the notary exercised judicial power in violation of Sec. 1 of Art. IV, Sec. 8 of Art. II and Section 32 of Art. II of the Constitution of Ohio, that Sections 11510, 11511 and 11512, G. C., are unconstitutional, if construed to give the notary power so [fol. 199] to adjudicate, that such attempted adjudication being made in the absence of the petitioner, without notice to him, or hearing, and without him being present or represented by counsel, or having opportunity to know of the charge against him, was in violation of the Constitution of Ohio and the 14th amendment to the Constitution of the United States, and that the notary public was disqualified to sit in judgment upon the petitioners by reason of his personal pecuniary interest. It is a complete answer to the contention so made by the petitioners that the notary public, in committing the witness to jail for refusing to answer questions and in issuing an attachment for the witnesses who refused to respond to subpœna, does not exercise judicial power.

De Camp vs. Archibald, 50 Ohio St., 618;
Benckenstein vs. Schott, 92 Ohio St., 29, 38.

Marion A. Miller was not served with process and is not a party to the suit, and may never be. In fact, there is no good reason why the cause may not be tried in the court of common pleas without obtaining service on Miller, as he does not seem to be a necessary party. However that may be, depositions may be used against parties who were served with notice and upon trial the depositions may be received against all defendants, if the one not receiving notice of the taking of them waives objection.

Ryan vs. Conner, 40 Ohio St., 368.

At any rate, the plaintiff might properly proceed to take depositions, although Miller had not been served with notice.

Many of the questions raised would, if decided, require this court to anticipate decisions of the court of common pleas. Questions of the sufficiency of pleadings are, in the first instance at least, properly questions for the determination of the court in which the pleadings are filed. We cannot decide in advance questions made in the court in which the original action pends, and what has been said is by way of argument only.

[fol. 200] We have no hesitancy in reaching the conclusion that the contentions of the petitioners are not well-founded and that the petitions should be dismissed.

Petitions dismissed.

Lloyd and Richards, JJ., concur.

Approved:

Roy H. Williams, Judge. (Seal.)

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[fol. 201] Certificate of Lodgment omitted in printing.

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[fol. 202] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 203] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed March 20, 1933

The appellant in the above entitled cause states that the points upon which he intends to rely in this court in this case are as follows:

1. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property without due process of law."

2. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to [fol. 204] the appellant, who was arrested and deprived of his liberty by order of a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no State "shall deprive any person of life, liberty, or property, without due process of law".

3. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514, and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evi-

dence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral ac- [fol. 205] tion brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

4. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

5. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use

in a civil cause pending in a state court, that any questions [fol. 206] that might be propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property, without due process of law".

6. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be produced by said notaries public, without re- [fol. 207] gard to the materiality, relevancy or competency of such questions or such books, papers or documents.

7. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503, 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarity and inher-

ently judicial power to attach and imprison a witness summarily as for alleged contempt of them; contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

8. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections, and each of them, as applied to the facts in this case, do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and the imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and [fol. 208] the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this appellant was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

9. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment and detention had a direct, substantial, personal, pecuniary interest in taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and to produce the books, papers and documents which appellant was ordered to produce and in finding and adjudging this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge or to cause appellant's attachment and detention by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged

pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of attachment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law, in violation of Section [fol. 209] 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

10. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512, and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

Appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of this case:

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| 2. Petition for Appeal | 2– 4 |
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| 5. Order allowing Appeal | 22– 23 |
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| 9. Appellee's Statement making against the jurisdiction asserted by the appellant | 36– 58 |
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| 30. Motion for New Trial, filed in Court of Appeals of Lucas County, Ohio | 136–139 |
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| 31. Bill of Exceptions | 140–173 |
| 32. Page containing reference to Plaintiff's Exhibit 1 (Petition for Equitable Relief) | 174 |
| 33. Demurrer of the defendant, Franklin H. Biggs | 175 |
| 34. Print only title of Plaintiff's Exhibit 3, as follows: "Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930." | 177 |
| 35. Page containing title of Plaintiff's Exhibits 3A and 3B, and reference to Plaintiff's Exhibit 3C (Order of Attachment of John W. Koehrman) | 179 |
| 36. Print only title of Plaintiff's Exhibit 4, as follows: "Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Sections 178 and 183" | 180 |
| 37. Plaintiff's Exhibit 6 (Notice to take depositions) and proof of service | 185–186 |
| 38. Page containing title of Plaintiff's Exhibit 7; reference to Plaintiff's Exhibit 8 (Subpœna duces tecum served upon John W. Koehrman); titles of Plaintiff's Exhibits 9 to 11, inclusive | 187 |
| 39. Defendant's Exhibit 1 (Notice to take depositions) | 188 |

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| 40. Print only title of Defendant's Exhibit 2, "State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York" | 189 |
| 41. Print only title of Defendant's Exhibit 3, "State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York" | 192 |
| 42. Defendant's Exhibit 4 (Summons and Return of Service) | 195 |
| 43. Opinion of Court of Appeals, Lucas County, Ohio | 196–200 |
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Crary Davis, Geo. D. Welles, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

Dated March 17, 1933.

ACKNOWLEDGMENT OF SERVICE

Due service, and receipt of copy, of the Appellant's foregoing Statement of Points to be relied upon and Designation of the Parts of the Record to be printed are acknowledged.

Newton D. Baker, Raymond T. Jackson, John C. Morley, Harold W. Fraser, Counsel for Appellee.

March 18, 1933.

[fol. 214] [File endorsement omitted.]

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Endorsed on cover: File No. 37,482. Ohio Supreme Court. Term No. 785. John W. Koehrman, appellant, vs. David M. Krieger, as sheriff of Lucas County, Ohio. Filed March 16, 1933. File No. 37,482.

CLERK'S COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 786

ROBERT A. STRANAHAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 16, 1933

(37,483)

# (37,483)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1932**

# No. 786

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ROBERT A. STRANAHAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 2] IN SUPREME COURT OF OHIO

No. 23654

EX PARTE ROBERT A. STRANAHAN, Plaintiff-in-error

PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO TO THE SUPREME COURT OF THE UNITED STATES—Filed Feb. 10, 1933

To the Chief Justice of the Supreme Court of Ohio:

The petitioner, Robert A. Stranahan, is the plaintiff-in-error in the above entitled case.

On the 14th day of June, 1932, petitioner commenced his suit in the Court of Appeals for Lucas County, Ohio, seeking his discharge from imprisonment by the Sheriff of Lucas County, Ohio, under an order of attachment issued by one William Purcell, a notary public, for an alleged contempt of said notary occurring during an attempt to take depositions before said notary public in a certain action, entitled "Clara Sielcken-Schwarz, Plaintiff, v. The Woolson Spice Company et al., Defendants", numbered 131,925 on the docket of the Common Pleas Court of Lucas County, Ohio. Final judgment was rendered against the petitioner by said Court of Appeals and by said judgment he was remanded to the custody of said Sheriff, the respondent herein.

After said judgment the petitioner filed his petition-in-error in this cause in the Supreme Court of Ohio, seeking a reversal of the said judgment of the said Court of Appeals; and, after hearing, the Supreme Court of Ohio, on January 25th, 1933, made and entered its final decision and judgment herein affirming the judgment of the said Court of Appeals.

The Supreme Court of Ohio is the highest court of the State of Ohio in which a decision could be had in said suit, and its said judgment is final.

[fol. 3] In this suit there is drawn in question the validity of certain statutes of the State of Ohio, viz., Ohio General Code Sections 11510, 11511 and 11512, on the ground that they and each of them, and the operation of said sections and each of them, as applied to the facts in this case, deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

There is also drawn in question in this suit the validity of certain other statutes of the State of Ohio, viz., Ohio General Code Sections 11497 and 11514 on the ground that they and each of them and the operation of said sections and each of them, as applied to the facts in this case, likewise deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

Manifest error has occurred, to this petitioner's prejudice, as shown herein and in the assignment of errors filed herewith, in which are more fully set out the errors complained of.

In accordance with the Rules of the Supreme Court of the United States (Rule 46, par. 2) the petitioner respectfully shows that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54; 28 U. S. C. A. Sec. 861 (a)) was passed, viz., under 28 U. S. C. A. Sec. 344, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of Ohio to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of Ohio may be examined [fol. 4] and reversed and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio, may be sent to the Supreme Court of the United States, as provided by law. Petitioner, desiring the appeal to be a super-

sedeas, also prays that an order be made fixing the amount of security which petitioner as appellant, shall give and furnish upon said appeal, and that upon the giving of said security, all further proceedings in this court be suspended and stayed, and the supersedeas granted by this court to the judgment of the Court of Appeals of Lucas County, Ohio, remain in force until the determination of said appeal by the Supreme Court of the United States.

George D. Welles, Crary Davis, Attorneys for Petitioner. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fol. 5] [File endorsement omitted.]

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[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 10, 1933

Plaintiff-in-error, Robert A. Stranahan, hereinafter referred to as appellant, in connection with and as a part of his petition for an appeal herein to the Supreme Court of the United States, assigns the following errors in the record and proceedings in this case upon which he will rely upon said appeal:

First. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals of Lucas County, Ohio, and in refusing to reverse the judgment of said court.

Second. The Supreme Court of Ohio erred in not finding and adjudging that this appellant was wrongfully and illegally imprisoned without due process of law, in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in not ordering appellant discharged.

Third. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11510, 11511 and 11512, and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the pro-

visions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

[fol. 7] Fourth. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

Fifth. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was arrested and deprived of his liberty by a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property, without due process of law".

Sixth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514,

and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the [fol. 8] Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that any state shall "deprive any person of life, liberty or property, without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

Seventh. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512, and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary

public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary [fol. 9] finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

Eighth. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions that might be propounded to appellant were material to any issue in the case in which it was attempted to take said depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty or property without due process of law".

Ninth. The Supreme Court of Ohio erred in not holding that appellant has, without due process of law and in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, been unlawfully deprived of his liberty in actual fact by reason of an order given by one of counsel for a party in a civil cause in the Court of Common Pleas of Lucas County, Ohio, to a notary public and carried into effect by such notary

public, who had been employed by such counsel, and that [fol. 10] appellant was in fact deprived of his liberty by the acts and orders of such counsel, pretending to comply with the form of law through the use of the signature of said notary public on the order of attachment for and under which appellant was arrested and deprived of his liberty.

Tenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public, without regard to the materiality, relevancy or competency of such questions.

Eleventh. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

Twelfth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1

[fol. 11] of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

Thirteenth. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and in finding and adjudging this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge, or to cause appellant's attachment and detention, by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law,

[fol. 12] in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

Fourteenth. The Supreme Court of Ohio erred in holding that the Court of Appeals of Lucas County, Ohio, likewise did not err in holding as stated in each of the foregoing assignments of error numbered second to thirteenth, inclusive.

Wherefore the petitioner prays that the said judgment of the Supreme Court of Ohio, dated January 25th, 1933, in the above entitled cause be reversed and that judgment be rendered in his favor.

Dated February 10th, 1933.

George D. Welles, Crary Davis, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fols. 13-21] [File endorsement omitted.]

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[fol. 22] IN SUPREME COURT OF OHIO

No. 23654

EX PARTE ROBERT A. STRANAHAN, Plaintiff in Error

ORDER ALLOWING APPEAL—Filed Feb. 10, 1933

The plaintiff-in-error and appellant, Robert A. Stranahan, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Ohio on the 25th day of January, 1933, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and his statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment of the Supreme Court

of Ohio, all pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

It is further ordered that said appellant shall give good and sufficient security in the sum of $1,000.00 that said appellant shall prosecute said appeal to effect and if said appellant fail to make his plea good, he shall answer all damages and costs; that upon the appellant's giving said security, the appeal shall operate as a supersedeas and stay [fol. 23] of execution and other proceedings under said judgment of the Supreme Court of Ohio, pending such appeal and appellant shall be enlarged pending such appeal.

Dated February 10th, 1933.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio. —— ——, Associate Justice of the Supreme Court of the United States.

[fol. 24] [File endorsement omitted.]

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[fols. 25 & 26] Citation, in usual form, showing service on David M. Krieger et al.; filed Feb. 16, 1933; omitted in printing.

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[fol. 27] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL—Filed March 3, 1933

It is hereby stipulated by and between counsel for the appellant, Robert A. Stranahan, and counsel for the appellee, David M. Krieger, as Sheriff of Lucas County, Ohio, that the Clerk of the Supreme Court of Ohio shall

make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and shall include in such transcript of record the following and no other papers and exhibits:

1. Title page and caption;

2. Petition-in-error filed in the Supreme Court of Ohio on June 24, 1932, and Entry of Appearance by defendant-in-error, filed with the Clerk of the Supreme Court of Ohio, on June 25, 1932;

3. Transcript of Docket and Journal Entries in Court of Appeals, Lucas County, Ohio, filed with the Clerk of the Supreme Court of Ohio on July 23, 1932;

4. The pleading which bears title "Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County, Ohio, on June 14, 1932, (which pleading appellant claims to be a petition for Writ of Habeas Corpus and appellee claims to be an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibits attached to said petition, said Exhibits being the Subpœna upon this appellant, Robert A. Stranahan, and the writ of attachment of this appellant, Robert A. Stranahan;

5. The pleading bearing the title "Amendment to Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County, Ohio, on June 15, 1932, (which pleading appellant claims to be an amendment to his Petition for [fol. 28] a Writ of Habeas Corpus and appellee claims to be an Amendment to an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibit A, attached thereto, which Exhibit A is the petition filed in the Court of Common Pleas, Lucas County, Ohio, in case entitled "Clara Sielcken-Schwarz, New York, plaintiff, v. The Woolson Spice Company, et al., defendants";

6. Writ bearing the title "Writ of Habeas Corpus" filed with the Clerk of said Court of Appeals, Lucas County, Ohio, on June 15, 1932 (which writ appellant claims to be a Writ of Habeas Corpus and appellee claims to be a writ issued upon an Application for Discharge from Imprisonment under O. G. C. Sec. 11514), together with the Sheriff's

Return thereto; the Writ and attachment papers attached to said return to be shown only by incorporating, by reference, the "order of attachment" and subpœna attached as exhibits to the pleading (referred to in paragraph numbered 4 of this Stipulation) bearing the title of "Petition for Writ of Habeas Corpus"; the Sheriff's return to said order of attachment and the Notary's return of service of said subpœna to be here included in full;

7. Recognizance, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 17, 1932;

8. Motion for New Trial, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 22, 1932;

9. Bill of exceptions, allowed by said Court of Appeals on June 23, 1932, and filed with the Clerk of the Supreme Court of Ohio on July 23, 1932; together with plaintiff's Exhibits 1, 2, 3, 3A, 3B, 3C, 4 and 6 to 11, inclusive, and defendant's Exhibits 1 to 4, inclusive. Of the foregoing exhibits the following to be shown only by reference to the same papers in preceding pages of transcript, viz: Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants) by incorporating, by reference, the same paper which is attached as Exhibit A to the pleading (referred to in paragraph numbered 5 of this stipulation) bearing the title "Amendment to Petition for Writ of Habeas Corpus;" Plaintiff's Exhibits 3B and 10 (order of attachment of Robert A. Stranahan) and 9 (subpœna on said Robert A. Stranahan) by incorporating, by reference, the same papers [fol. 29] which are attached as Exhibits to the pleading (referred to in paragraph numbered 4 of this stipulation) bearing the title "Petition for Writ of Habeas Corpus"; of the foregoing Exhibits the following to be indicated only by title as follows, viz: Plaintiff's Exhibit 3A (Notary's Order of Commitment for C. N. Bevan); Plaintiff's Exhibit 3C (Notary's Writ of Attachment of John W. Koehrman); Plaintiff's Exhibit 7 (Subpœna Duces Tecum served upon C. N. Bevan); Plaintiff's Exhibit 8 (Subpœna Duces Tecum served upon John W. Koehrman); Plaintiff's Exhibit 11 (Opinion of the Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas, 92 N. Y. 40); of the foregoing, Plain-

tiff's Exhibit 4 and Defendants' Exhibits 2 and 3 shall be abbreviated in accordance with the typewritten copies thereof submitted to you by counsel.

10. Opinion of the Court of Appeals of Lucas County, Ohio, in this cause.

11. Journal Entry filed in Supreme Court of Ohio on August 24, 1932, substituting Gilson D. Light, as Sheriff of Lucas County, Ohio, as defendant-in-error;

12. Motion for Stay of Execution and Advancement of Cause, filed in Supreme Court of Ohio, on October 15, 1932, and notice of hearing;

13. Order of Supreme Court of Ohio, entered on or about October 26, 1932, granting stay of execution;

14. Supersedeas bond filed in Supreme Court of Ohio on November 25, 1932;

15. Judgment of the Supreme Court of Ohio filed on January 25, 1933;

16. Opinion of Supreme Court of Ohio in this cause;

17. Order of Supreme Court of Ohio substituting David M. Krieger as Sheriff of Lucas County, Ohio, as defendant-in-error nunc pro tunc, filed February 10, 1933;

[fol. 30] 18. Appellant's petition for appeal filed herein on February 10, 1933;

19. Appellant's assignment of errors, filed herein on February 10, 1933;

20. Appellant's statement as to the basis on which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the said judgment of the Supreme Court of Ohio, filed herein on February 10, 1933;

21. Order allowing appeal and supersedeas, filed herein on February 10, 1933;

22. Appeal and supersedeas bond approved and filed herein on February 17, 1933;

23. Statement to respondent-appellee (defendant-in-error in the Supreme Court of Ohio) re Paragraph 3, Rule 12, of the Supreme Court of the United States, and ac-

knowledgment of service thereof, filed herein on February 10, 1933;

24. Citation upon appeal and proof of service, filed herein on February 16, 1933;

25. Stipulation as to Transcript of Record on Appeal;

26. Appellee's Statement Making Against the Jurisdiction Asserted by the Appellant, filed herein on February 24, 1933;

27. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 22nd day of March, 1933, pursuant to the order allowing said appeal.

It is further stipulated by and between the parties that the foregoing items constitute all portions of the record necessary for a determination of the questions raised on this appeal and that no portion of the record omitted is [fol. 31] necessary or material for a determination of such questions.

Dated March 2, 1933.

Geo. D. Welles, Crary Davis, Attorneys for Appellant. Stuart S. Wall, H. S. Bugbee, Thomas J. Lynch, of Counsel. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Appellee. Newton D. Baker, Harold W. Fraser, Raymond T. Jackson, John C. Morley, of Counsel.

[fols. 32-59] [File endorsement omitted.]

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[fols. 60 & 61] Supersedeas bond on appeal for $1,000 approved and filed February 17, 1933, omitted in printing.

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[fol. 62] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION-IN-ERROR

Filed June 24, 1932

Robert A. Stranahan, plaintiff-in-error (hereinafter referred to as the petitioner), says that at the May Term,

1932, of the Court of Appeals of Lucas County, Ohio, on June —, 1932, in an action for a writ of habeas corpus which originated and was therein pending, being Cause No. 2693, entitled "Ex Parte Robert A. Stranahan", and in which plaintiff-in-error was petitioner, and Joseph Zimmerman, as Sheriff of Lucas County, Ohio, was respondent, a judgment was rendered against the petitioner.

Said case originated in said Court of Appeals and involved questions arising under the Constitution of the United States and the Constitution of Ohio.

A transcript of the docket and journal entries and the original papers in said Court are filed herewith.

There is substantial error in said record, proceedings and judgment, to the manifest prejudice of petitioner, in the following and other respects:

(1) Said Court of Appeals erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) Said Court of Appeals erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of said Court of Appeals are contrary to law.

(4) The finding, decision and judgment of said Court of Appeals are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court of Appeals are erroneous, in that there is no evidence to sustain them.

(6) Said Court of Appeals erred in not finding and adjudging that the order of attachment under which petitioner [fol. 63] was imprisoned by the respondent was void and of no effect.

(7) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give would be relevant or ma-

terial to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(8) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in said case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing any attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of [fol. 64] Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety".

(10) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in

this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated".

(11) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power on notaries.

(13) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of [fol. 65] Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) Said Court of Appeals erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require peti-

tioner to attend as a witness or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) The Court of Appeals erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) Said Court of Appeals erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due process of law in violation of the Fourteenth Amendment [fol. 66] to the Constitution of the United States of America and were null and void.

(17) Said Court of Appeals erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the

Fourteenth Amendment of the Constitution of the United States and were null and void.

(18) Said Court of Appeals erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(19) Said Court of Appeals erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(20) The Court of Appeals erred in other respects apparent on the face of the record.

(21) Said Court of Appeals erred in overruling petitioner's motion for a new trial.

[fol. 67] Wherefore, petitioner prays that said judgment in the Court of Appeals be reversed and that he be restored to all things lost thereby.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

[fol. 68] IN SUPREME COURT OF OHIO

[Title omitted]

ENTRY OF APPEARANCE—Filed June 25, 1932

The undersigned defendant-in-error and respondent waives the issuances and service of summons-in-error and enters his appearance herein.

Joseph Zimmerman, as Sheriff of Lucas County, Ohio.

6/24/32.

Fraser, Hiett, Wall & Effler, Counsel of record for Respondent in Court of Appeals.

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[fol. 69] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed August 24, 1932

Upon the suggestion by counsel for the petitioner, and it appearing to the court, that during the pendency of these proceedings-in-error the respondent and defendant-in-error, Joseph Zimmerman, has ceased to be Sheriff of Lucas County, Ohio, and that Gilson D. Light has succeeded said Zimmerman in said office and is now the Sheriff of Lucas County, Ohio, and with the consent of all parties, including said Gilson D. Light.

It is Ordered and Adjudged:

That said Gilson D. Light, as Sheriff of Lucas County, Ohio, is substituted as respondent and defendant-in-error herein in place of said Joseph Zimmerman, and that these proceedings-in-error proceed under their original title

Approved.

Tracy, Chapman & Weiles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner-Plaintiff-in-error. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Respondent-Defendant-in-error.

O. K. Gilson D. Light.

[fol. 70] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Filed October 15, 1932

Now comes plaintiff-in-error, R. A. Stranahan, and moves the court for an order staying execution of the final judgment of the Court of Appeals of Lucas County, Ohio, to reverse which this proceeding-in-error is being prosecuted, until this proceeding-in-error shall have been heard and decided by this court, and to fix the terms of such stay of execution.

Plaintiff-in-error further moves the court that, in the event his motion for a stay of execution be not granted, this cause be advanced for hearing and decision by this court on a date prior to the 25th day of October, 1932.

The foregoing motion for stay of execution is made upon the grounds that the present proceeding, which is in habeas corpus, presents substantial and important questions for determination.

(a) As to the construction of Sections 11510, 11511 and 11512, General Code, and their constitutionality both in respect to the Constitution of the State of Ohio and the Fourteenth Amendment to the Constitution of the United States;

(b) As to the disqualification of the Notary Public to issue the orders of commitment and attachment;

(c) As to whether any evidence is or could be relevant or material, or the giving of it enforced at the instance of the plaintiff in an action which the plaintiff has no right or capacity to maintain and in which her petition states no cause of action;

(d) As to whether the plaintiff in said action, in the Common Pleas Court of Lucas County, Ohio, has any right or capacity to maintain said action and whether her petition states any cause of action, which questions are raised in said Common Pleas Court by a demurrer filed by one [fols. 71-74] of the defendant in said action, which demurrer is pending and set for hearing on October 27, 1932;

(e) Other and related questions, shown by the brief of plaintiff-in-error, which questions are of general interest and importance; and upon the further grounds appearing in the attached affidavit of plaintiff-in-error in support hereof.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

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[fol. 75] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER GRANTING MOTION BY PLAINTIFF IN ERROR FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Oct. 26, 1932

It is ordered by this Court that this motion be, and the same hereby is, allowed.

Journal 33, Page 29.

[fol. 76] Supersedeas bond on stay for $100.00 approved and filed Nov. 25, 1932, omitted in printing.

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[fol. 77] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY, A. D. 1933

No. 23654

Ex Parte ROBERT A. STRANAHAN

Error to the Court of Appeals of Lucas County

JUDGMENT—Jan. 25, 1933

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable

grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended taxed at $—.

Ordered, that a special mandate be sent to the Court of Appeals of Lucas County to carry this Judgment into execution.

Journal 33, page 91.

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[fol. 78] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed February 10, 1933

Upon the suggestion by counsel for the plaintiff-in-error, and it appearing to the Court, that during the pendency of these proceedings in error, viz., on January 1, 1933, defendant-in-error, Gilson D. Light, ceased to be Sheriff of Lucas County, Ohio, and that David M. Krieger has succeeded said Light in said office and is now Sheriff of Lucas County, Ohio.

It is Ordered and Adjudged:

That said David M. Krieger, as Sheriff of Lucas County, Ohio, is substituted nunc pro tunc as defendant-in-error herein in place of said Gilson D. Light.

Carl V. Weygandt, C. J.

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[fol. 79] IN SUPREME COURT OF OHIO

Ex Parte BEVAN

Ex Parte KOEHRMAN

Ex Parte STRANAHAN

Evidence—Depositions—Judicial power not exercised by notary public committing witness for contempt—Constitutional law—Sections 11510, 11511 and 11512, General Code—Due process of law—Committed witness

afforded statutory remedy—Section 11514, General Code—Relevancy or competency of testimony and privilege preserved in trial court—Right to cross-examine adverse party vests when summons served—Sections 11497 and 11526, General Code—Cross-examination authorized, although codefendant not served—Codefendant may be served, how—Section 11299, General Code—Infirmity of petition or action not ground for refusal to respond—Notary public not disqualified for interest in taking depositions—Subpœna duces tecum not unreasonable search and seizure—Entire corporate correspondence file, records and documents ordered produced—Collection of assets of corporation—Heir or legatee may maintain action, upon refusal of personal representative.

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio. St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the Statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason

why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

[fol. 80] 5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpœnas duces tecum, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

Nos. 23652, 23653 and 23654

Decided January 25, 1933

Error to the Court of Appeals of Lucas County

Opinion

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases.

An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error C. N. Bevan was held under a commitment issued by a notary [fol. 81] public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpœna duces tecum, in the course of the taking of his deposition in the suit of Clara Sielcken-Schwarz v. The Woolson Spice Company et al., pending in the common pleas court of Lucas county. The plaintiffs in error John W. Koehrman and Robert A. Stranahan had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpœnas personally served upon them.

The materal facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error John W. Koehrmann and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrmann and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham. in asso-

[fol. 82] ciation with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the common pleas defendants, and subpœnas duces tecum were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the common pleas plaintiff were served with a motion to quash the notice to take depositions and the subpœnas duces tecum, and to enjoin [fol. 83] the taking of depositions. This motion came on for hearing before the common pleas court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court, an agreement was reached between counsel for the common pleas plaintiff and chief counsel for the common pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions

on June 13th were served on the common pleas defendants, subpœnas duces tecum upon the plaintiffs in error Bevan and Koehrman, and ordinary subpœnas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a. m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpœna. The witnesses Koehrman and Stranahan disregarded their subpœnas and failed to appear. On the failure of three of the witnesses summoned to appear, and the failure of the witness, Bevan, to make any compliance with his subpœna duces tecum, the notary adjourned the hearing until 2 p. m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpœna. Prior to this adjourned time for the taking of these depositions a supplemental motion to quash the new notices and subpœnas, and to enjoin the taking of depositions in the common pleas suit was filed in the common pleas court. At 2 p. m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only [fol. 84] reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpœna duces tecum. Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpœna duces tecum.

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in obedience to their subpœnas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county,

Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a. m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of habeas corpus were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and com- [fol. 85] mon pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the Court of Appeals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the common pleas plaintiff was entitled to take the depositions of these witnesess at once; that the subpoenas duces tecum called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpoenas.

On June 22d the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on June 29th these [fol. 86] applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch, for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson and Messrs. Fraser, Hiett, Wall & Effler, for defendant in error.

STEPHENSON, J.:

These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpoena, and Bevan and Koehrman were served with subpoenas duces tecum.

No complaint is made as to the service of the subpoenas. It is contended that the subpoenas duces tecum "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case it is significant that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpoenas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents de- [fol. 87] scribed in his subpoena duces tecum, giving as his reason therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of habeas corpus, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. Bevan v. Light, Sheriff, (C. C. A.), 61 F. (2d), 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the Governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his [fol. 88] ability to perform the duties of the office, or ascer-

tain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine," and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must [fol. 89] hold that a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if

it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpœna or for refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. [fol. 90] Notices are regularly served to take depositions of the officers of an adversary corporation. Subpœnas are regularly served. One officer appears in obedience to his subpœna, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of com-

petent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpœnas duces tecum did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpœnas as unreasonably com- [fol. 91] prehensive, or that they constitute unlawful search and seizure.

Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N. S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpœnas, in the face of Section 11526, General Code, which provides, in substance, that deposi-

tions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing [fol. 92] relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpœna, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: De Camp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C. J., and Kinkade, J., not participating.

[fol. 93] Reporter's Certificate to foregoing paper omitted in printing.

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[fol. 94] In Court of Lucas County

C. A. No. 2693

Appearance Docket No. 6, Page 193

Ex Parte Robert A. Stranahan

Marshall, Melhorn, Marlar & Martin.
Tracy, Chapman & Welles.

Docket Entries—Filed Supreme Court of Ohio, July 23, 1932

1932

June 14. Petition for Writ of Habeas Corpus filed.
June 14. Writ of Habeas Corpus granted. Bond fixed at $100.00. Jour. 7-276.
June 14. Præcipe filed Writ of Habeas Corpus issued and delivered Sheriff.
June 15. Writ of Habeas Corpus filed, endorsed as follows, viz.: Received this writ June 14, 1932, at 10:45 a. m. and pursuant to its command I do now have this 15th day of June, 1932, at 9:30 a. m. the body of Robert A. Stranahan before the Court of Appeals of Lucas County, Ohio. I certify that the cause and reason for my having the said Robert A. Stranahan in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio. Which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein. Joseph Zimmerman, Sheriff, by Rolland Staggemeier, Deputy. .91.
June 15. Amendment to Petition for Writ of Habeas Corpus filed.
June 17. Recognizance filed.

June 22. Petition of Petitioner dismissed. Robert A. Stranahan, Petitioner, remanded to custody of Joseph Zimmerman, Sheriff, Petitioner to pay costs. Petitioner excepts. Jour. 7-285.

June 22. Motion for New Trial filed.

June 22. Motion for new trial overruled. Petitioner excepts and is given leave to file Bill of Exceptions. Jour. 7-286.

June 23. Bill of Exceptions of Petitioner filed.

June 23. Time waived Bill of Exceptions presented to the Court of Appeals.

[fol. 95]

June 23. Bill of Exceptions returned by Court of Appeals.

June 27. Motion to stay execution of Judgment and order filed.

June 29. Above motion denied. Petitioner excepts. Jour. 7-292.

Clerk's certificate to foregoing paper omitted in printing.

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[fol. 96] In Court of Appeals of Lucas County, Ohio

At a term of the above-named court, begun and held before the Hon. Harry W. Lloyd, Hon. Silas S. Richards, Hon. Roy H. Williams, Presiding Judges, on the 16th day of May, A. D. 1932, among other proceedings had by and before said Court on the 14th day of June, A. D. 1932, being the 25th day of said term, as appears by its Journal of that day, were the following, viz.:

Journal Entries

C. A. No. 2693

Ex Parte Robert A. Stranahan

On application of Robert A. Stranahan upon his filing the petition herein, a writ of habeas corpus is hereby granted as prayed for in said petition, returnable at 9:30 a. m. Wednesday, June 15, 1932.

Bond is fixed in the sum of $100.00, personal cognizance.

Court of Appeals, by Harry W. Lloyd, Presiding Judge.

In Court of Appeals of Lucas County

C. A. No. 2693

Ex Parte Robert A. Stranahan

Judgment—June 22, 1932

Now came the respondent herein, Joseph Zimmerman, Sheriff of the County of Lucas and State of Ohio, and made return of the writ of habeas corpus heretofore issued in this case, and also brought the body of the said Robert A. Stranahan petitioner herein.

Whereupon the court having heard and considered the evidence offered by the petitioner and the respondent, the arguments of counsel and being fully advised in the premises, finds that the said Robert A. Stranahan, is lawfully detained and imprisoned by the said Joseph Zimmerman, Sheriff of Lucas County, Ohio.

It is, therefore, ordered, adjudged and decreed that the [fol. 97] petition of the said petitioner, Robert A. Stranahan, be and the same hereby is dismissed, and he is remanded to the custody of the said Joseph Zimmerman, Sheriff of Lucas County, Ohio; and it is further ordered that the said petitioner pay the costs of this proceeding.

To all of which orders, judgments and decrees of the court the said petitioner, Robert A. Stranahan, excepts.

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On the 22nd day of June, 1932, being the 32nd day of the May Term, 1932, an Order in said cause was rendered, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2693

Ex Parte Robert A. Stranahan

This cause came on to be heard on the petitioner's motion for a new trial and was submitted to the court. Upon consideration thereof the court finds that said motion is not well taken and the same ought to be and hereby is overruled; to which action and order of the court the petitioner

objects and excepts, and upon his application is given leave to prepare and file a bill of exceptions herein.

On the 29th day of June, 1932, being the 38th day of the May Term, A. D. 1932, an Order in said cause was rendered, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2693

Ex Parte Robert A. Stranahan

The petitioner's motion for an order suspending and staying execution of the judgment of this court discharging the writ of habeas corpus and remanding him to the custody of the Sheriff of Lucas County and dismissing his petition, having this day come on for hearing, the Court finds that said motion is not well taken and that it should be and the same is hereby denied.

To all of which petitioner excepts.

[fol. 98] No other Judgments or Decrees were rendered or Orders or Journal Entries made in said cause, as appears upon the Journal of said Court.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

The State of Ohio,
Lucas County, ss:

I, Geo. E. Hardy, Clerk of the Common Pleas and Courts of Appeal within and for the County of Lucas and State of Ohio, do hereby certify that the above foregoing Exhibits numbered 1 to 10, inclusive, contain all the original Pleadings, Process Papers and Records, and a full and true Transcript of all the Docket and Journal Entries in said cause and proceeding in said Court and in the Court of Common Pleas of said County, in cause No. 2693 C. A. Ex Parte, Robert A. Stranahan.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

[fol. 99] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. 2693

EX PARTE ROBERT A. STRANAHAN

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 14, 1932

Your petitioner, Robert A. Stranahan, respectfully represents that he is unlawfully imprisoned and restrained of his liberty by Joseph Zimmerman, Sheriff of Lucas County, Ohio, in the County Jail of said county, without any legal authority, but under color of a pretended attachment issued by one William Purcell, styling himself a Notory Public in and for the County of Lucas, State of Ohio, a copy of which alleged attachment is attached hereto.

Your petitioner further says that he is advised by counsel that the pretended subpœna purporting to require his attendance before William Purcell, Notary Public, is wholly illegal and void and that no questions which could be asked him and no answer he might give would be relevant or material to any issue in said cause of Clara Sielcken Schwarz v. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County; that petitioner is informed and believes, and therefore avers, that proper service of notice of the taking of said pretended deposition, such as to make it admissible in evidence on the trial of this cause, has not been made; that petitioner is a resident of Lucas County, Ohio, in good health, and in every way capable of and expecting to appear at the trial of this cause in the Court of Common Pleas of Lucas County, Ohio, if called as a witness.

Petitioner further avers that William Purcell, the Notary Public before whom said depositions were, according to said pretended notice, to be taken, has attempted to exercise judicial power in violation of Section 1 of Article IV of the Constitution of Ohio by issuing the warrant for the arrest of your petitioner under which petitioner is, as aforesaid, now unlawfully restrained of his liberty by the Sheriff of this county. Petitioner says that he has been [fol. 100] deprived of his liberty without due process or course of law and in violation of Section 1 of Article IV, Section 14 of Article I and Section 16 of Article I of the Constitution of the State of Ohio and of the Fourteenth amendment to the Constitution of the United States.

Petitioner further says that one of the defendants in said cause did on the 11th day of June, 1932, file a demurrer to the petition therein upon the grounds, among others, that plaintiff has not legal capacity to sue, and that the petition does not state facts showing a cause of action, and did on the said date file a brief in support of said demurrer, which said demurrer is pending in said Court of Common Pleas of Lucas County, Ohio, and certain of the defendants in said cause did, on or about the 4th day of June, 1932, file in said cause a motion to quash notice to take depositions and subpœnas duces tecum, and for an injunction, enjoining and restraining plaintiff and her attorneys from taking depositions in said cause until such time, if any, as might be fixed by said Court of Common Pleas for so doing, which said motion and a supplement thereto praying for an injunction against the further taking of the aforesaid deposition, are now pending before said Court of Common Pleas. Said demurrer, motion and supplement to said motion have not been decided and no orders have been issued upon them.

Petitioner is advised and says that said demurrer, motion and supplement to said motion, are well taken and should be sustained and granted.

Petitioner further says upon information and belief that plaintiff was not in good faith in attempting to take his testimony, as aforesaid, and that it was not the intention of plaintiff or her expectation that said testimony should be transcribed or used in the trial of said cause, except for the purpose of endeavoring to learn and ascertain facts and information to which plaintiff is not lawfully entitled, and for the purpose of endeavoring to learn and ascertain the means by which certain of the defendants in said cause expected and intended to establish their defenses to the alleged claims asserted by plaintiff in her petition against said defendants.

Wherefore, petitioner prays that a writ of habeas corpus be issued to the said Joseph Zimmerman, Sheriff of Lucas County, Ohio, and that petitioner be discharged from said [fol. 101] imprisonment and restraint of his liberty.

Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

*Duly sworn to by Robert A. Stranahan. Jurat omitted in printing.*

[fol. 102] IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

NOTARY'S ORDER OF ATTACHMENT

To the Sheriff of Lucas County, Ohio:

Whereas, in a certain action pending in the Common Pleas Court of Lucas County, Ohio, wherein Clara Sielcken Schwarz is plaintiff, and The Woolson Spice Company, et al., are defendants, the plaintiff filed with me a Notice to the defendants that it would, on the 13th day of June, 1932, take depositions on sundry witnesses at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, before me as Notary Public.

And, whereas, on the 7th day of June, 1932, at the request of the plaintiff, I issued a subpœna in said action whereby Robert A. Stranahan was commanded to appear before me, a Notary Public in and for the County of Lucas, Ohio, at the said office of Fraser, Hiett, Wall & Effler, Toledo, Ohio, therein on the 13th day of June, 1932, at 9:30 o'clock A. M., then and there to give evidence and the truth to say in a certain action wherein said Clara Sielcken Schwarz, is plaintiff, and The Woolson Spice Company, et al., are defendants.

And, whereas, said subpœna on the 7th day of June, 1932, was personally served on the said Robert A. Stranahan by myself, and fully appears by said return in the form of my affidavit endorsed thereon.

And, whereas, the said Robert A. Stranahan failed to attend, in obedience to said subpœna, as he was summoned to do.

You are therefore commanded to attach the said Robert A. Stranahan so as to have his body before me, William Purcell, a Notary Public in and for Lucas County, Ohio, [fol. 103] at the said office of Fraser, Hiett, Wall & Effler,

710 Home Bank Building, Toledo, Ohio, forthwith, as well to answer the State of Ohio for said contempt in disobeying said subpœna, as to give his testimony in the action, in the recital of this writ mentioned, and have then and there this writ.

Given under my hand and official seal this 13th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Seal.) (Rubber stamp) William Purcell.

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[fol. 104] In Common Pleas Court of Lucas County, Ohio

Clara Sielcken-Schwarz, Plaintiff,

vs.

The Woolson Spice Company et al., Defendants

Subpœna

To Robert A. Stranahan, % Champion Spark Plug Company, Toledo, Ohio:

You are hereby commanded to be and appear before me, the undersigned, a notary public within and for the County of Lucas and State of Ohio on the thirteenth day of June, A. D. 1932, at 9:30 o'clock A. M., there to be cross-examined and the truth to speak on behalf of the plaintiff above named, at number 710 Home Bank Building at Madison & Huron Streets, in the City of Toledo, in said county, the taking of testimony to be adjourned from day to day should necessity require.

Hereof Fail Not under Penalty of Law.

Witness my hand and official seal at Toledo, Ohio, this 7th day of June, 1932.

William Purcell, Notary Public, Lucas County, Ohio.

A true copy.

[fol. 105] In Court of Appeals of Lucas County, Ohio

C. A. #2693

Ex Parte Robert A. Stranahan

Amendment to Petition for Writ of Habeas Corpus—Filed June 15, 1932

Now comes petitioner Robert A. Stranahan and by leave of court files this amendment to his petition for writ of habeas corpus herein and without waiving or in any extent abandoning any allegations in his original petition, alleges:

1. That a true copy of the petition in the cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County, Ohio, referred to in petitioner's original petition herein, is hereto attached, marked "Exhibit A", and made a part hereof.

2. That for the reasons set forth in petitioner's original petition herein and for the additional reasons set forth in this amendment to said petition, William Purcell, the Notary Public by whose pretended order your petitioner was arrested and held by the Sheriff of Lucas County, Ohio, had no jurisdiction to take your petitioner's deposition in said cause, to issue a subpœna for your petitioner, to order your petitioner to answer any question or to make any order or issue any warrant for the arrest or imprisonment of your petitioner until he submit to testify in the premises, or otherwise.

3. That said Notary Public, as shown by his order of attachment attaching your petitioner and causing petitioner to be brought before him, assumed and attempted to exercise judicial power.

[fol. 106] 4. Said Notary Public, William Purcell, was wholly disqualified to make an order for the attachment of your petitioner and to cause petitioner to be brought before him under penalty of being punished for contempt for disobeying said subpœna, for the reason that said Notary Public had been employed by counsel for plaintiff in said suit of Clara Sielcken-Schwarz vs. The Woolson Spice Com-

pany, et al., to act as notary and stenographer in the taking of the deposition of your petitioner and the transcribing thereof and that the amount of the compensation of said Notary Public for such service was dependent in large part, if not wholly, upon the number of pages of such testimony or evidence by way of exhibits which he might take and transcribe or copy; that it was to the pecuniary interest of said Notary Public that he should compel your petitioner to testify before him so that such compensation might be earned by said Notary Public, and that said Notary Public was necessarily subject to the bias of his own personal pecuniary interest in determining whether or not an attachment should be issued for the bringing of petitioner before him to give his testimony in said action before said Notary Public, and for said reason said attachment was issued illegally and in violation of the Fourteenth Amendment of the Constitution of the United States.

5. That on the 14th day of June, 1932, after the Honorable Robert A. Gosline, Judge of the Court of Common Pleas of Lucas County, Ohio, before whom were pending the motions for injunctions, etc., referred to in your petitioner's petition herein, had been informed that this proceeding in habeas corpus was to be filed herein, announced that he would overrule said motions for injunction unless they were voluntarily withdrawn by the defendants in said cause who had filed same and thereupon said motions were withdrawn by said defendants.

6. Your petitioner says that the only color of authority which said William Purcell had for the issuance of the at- [fol. 107] tachment of your petitioner is by virtue of the provisions of Sections 11510, 11511 and 11512 of the General Code of the State of Ohio; that if said sections or any of them are or can be construed to authorize the issuance of said order of attachment herein by said William Purcell as Notary Public and as compelling the appearance of petitioner before said Notary Public to give testimony and produce books, papers and documents in pursuance of said order of attachment, then said sections of the statutes and each of them are void and unconstitutional by reason of the provisions of Section 1 of Article I, Section 5 of Article I, Section 10 of Article I, Section 14 of Article I, Section 16

of Article I, Section 1 of Article IV, and Section 32 of Article II of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States, and are wholly ineffective to invest said Notary Public with lawful power or jurisdiction to take such actions and proceedings or any of them.

Wherefore your petitioner prays as in his petition herein.

Marshall, Melhorn, Marlar and Martin and Tracy, Chapman & Welles, Attorneys for Petitioner.

*Duly sworn to by Robert A. Stranahan, jurat omitted in printing.*

[fol. 108] Exhibit "A" to Amendment to Petition

In Court of Common Pleas of Lucas County

No. 131,925

Clara Sielcken-Schwarz, New York, N. Y., Plaintiff,

v.

The Woolson Spice Company, a Corporation, 2700 Summit Street, Toledo, Ohio; John W. Koehrman, 1719 Superior Street, Toledo, Ohio; Franklin H. Biggs, 2613 Glenwood Avenue, Toledo, Ohio; Marion M. Miller, 2260 Scottwood Avenue, Toledo, Ohio; Frank D. Stranahan, Dixie Highway, Toledo, Ohio; Robert A. Stranahan, Ottawa Hills, Toledo, Ohio; Ammi F. Mitchell, 2057 Glenwood Avenue, Toledo, Ohio; and Leroy E. Eastman, 3416 Brookside Road, Toledo, Ohio, as Administrators of the Estate of William A. Brigham, deceased; Irving Trust Company, a foreign corporation, as Executor of the last will and testament of Herman Sielcken, deceased, Society for Savings Building, Cleveland, Ohio, Defendants

Petition for Equitable Relief

The above named plaintiff, Clara Sielcken-Schwarz, for her cause of action against the above named defendants respectfully alleges and shows:

[fol. 109] 1. That the plaintiff, Clara Sielcken-Schwarz, at and prior to the time of the commencement of this action,

was and now is a citizen of the United States and a resident of the State of New York, residing in the City and County of New York in said State.

2. That the defendant, Irving Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in New York City in said State; that said corporation is duly qualified to do business in Ohio and has appointed a statutory agent pursuant to the Ohio statutes and that said corporation is doing business in this State.

3. That the defendant, The Woolson Spice Company, at all times hereinafter mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and has its principal place of business at the City of Toledo, in said State; that at all times prior to, on or about July 25th, 1918, the total capital stock of said corporation consisted of 1,800 shares of common stock of a par value of One Hundred Dollars ($100.00) per share.

4. That the defendants, John Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan and Robert A. Stranahan, are citizens and residents of the City of Toledo, County of Lucas, State of Ohio, and that the defendants Ammi F. Mitchell and Leroy E. Eastman are the duly qualified and acting administrators of the estate of William A. Brigham, deceased, who at the time of his death was a resident of the City of Toledo, County of Lucas, State of Ohio.

5. That Herman Sielcken, who was a citizen of the United States and domiciled in the City, County and State of New York, died on or about the 8th day of October, 1917, leaving a last Will and Testament wherein he appointed The Columbia-Knickerbocker Trust Company, a corporation [fol. 110] organized and existing under the laws of the State of New York, Executor of his said Will; that thereafter and on or about the 25th day of January, 1918, the said Will was duly admitted to Probate by the Surrogates Court of the County of New York, State of New York, and letters testamentary on the said Will were thereupon duly issued by one of said Surrogates to The Columbia Trust Company, a corporation organized and existing under the

laws of the State of New York, as the successor of said The Columbia-Knickerbocker Trust Company; that thereafter and prior to the commencement of this action the defendant, Irving Trust Company, by certain mesne changes of corporate name, became and now is the continuation of the corporate entity and identify of said Columbia Trust Company and thereupon became the duly qualified and acting Executor of said Last Will; that the defendant, Irving Trust Company, has never been discharged as such Executor and that no other individual or corporation has been appointed Executor of said Last Will or administrator of the estate of said Herman Sielcken by said Surrogates Court or by any other court.

6. That said Herman Sielcken, in and by his Last Will and Testament, after providing certain specific legacies all of which have been fully paid and satisfied, gave, devised and bequeathed all the rest, residue and remainder of his property and estate, real and personal, whatsoever and wheresoever situate, absolutely to his wife, Clara Sielcken (by subsequent remarriage Clara Sielcken-Schwarz) who is the plaintiff herein, and that said plaintiff is now the full, complete, absolute and sole beneficial owner of all unadministered and undistributed assets of the estate of said Herman Sielcken.

7. That since the death of the said Herman Sielcken the plaintiff remarried and her present name is Clara Sielcken-Schwarz.

8. That heretofore and prior to the commencement of this action, the plaintiff duly requested the defendant, Irving Trust Company, as Executor of the Last Will and Testament of said Hermann Sielcken, deceased, to bring [fol. 111] this action in behalf of said estate and sought to persuade said defendant so to do, but that the said defendant has failed, neglected and refused to bring said action, and, therefore, this plaintiff has joined said Irving Trust Company, as such Executor, as a defendant in this action.

9. That at the time of his death said Hermann Sielcken was the sole beneficial owner of 824 shares of the capital stock of the defendant, The Woolson Spice Company, said shares being registered on the books of the said corporation in the name of Crossman & Sielcken, under which name

the said Hermann Sielcken carried on business; that in addition to said 824 shares there was registered on the books of the said corporation in the name of said Hermann Sielcken, 360 of said shares.

10. That on the 6th day of April, 1917, the Congress of the United States declared that a state of war existed between the United States and Germany and on the 6th day of October, 1917, the Congress of the United States enacted and the President approved the Act known as "The Trading with the Enemy Act."

11. That said Hermann Sielcken at the outbreak of war between the United States and Germany was, as the defendants and said William A. Brigham well knew, temporarily present in Germany on business in behalf of the defendant, The Woolson Spice Company.

12. Plaintiff is informed and believes that the said Herman Sielcken in the year 1909 acquired by purchase thereof 1,739 shares of the common capital stock of the defendant. The Woolson Spice Company, out of the said total capitalization of 1,800 common shares; that said Hermann Sielcken from the year 1909 until in or about the month of September, 1917, was president and a director of the defendant, The Woolson Spice Company; that subsequent to the purchase by him of said 1,739 shares, said Hermann Sielcken [fol. 112] from time to time sold certain of said shares to various persons including the defendants, Koehrman and Biggs, and said William A. Brigham, but for a large portion of said shares so sold said Hermann Sielcken did not receive prior to his death the purchase price, including the purchase of the shares sold to said defendants, Koehrman and Biggs, and said Brigham, and held said shares so sold as collateral to secure the purchase price thereof; that prior to the ousting of said Hermann Sielcken as president of the defendant, The Woolson Spice Company, as hereinafter more specifically related, the said Brigham was secretary and a director, the defendant Koehrman was general manager and a director, and the defendant Biggs was superintendent and a director of the defendant, The Woolson Spice Company, and were intimately associated in the conduct of the affairs of said corporation with said Her-

mann Sielcken, who, as hereinbefore stated, owned or controlled a majority of the capital stock thereof and by reason of such control maintained the defendants, Koehrman and Biggs, and said Brigham, in their said positions; that because of their intimate association and acquaintance with the business of the defendant, The Woolson Spice Company, over a period of many years, the defendants, Koehrman and Biggs, and said Brigham were informed upon every detail of said business and well knew the prosperous condition of the affairs of the said corporation.

13. Plaintiff is informed and believes that in or about the month of September, 1917, it being well known to the defendants, Koehrman and Biggs, and said Brigham, that the said Hermann Sielcken was being detained in Germany by the exigencies of the said war between the United States and Germany, that the said Hermann Sielcken was then suffering from a prolonged and serious illness which prevented him from traveling, that even in the event of peace [fol. 113] between the United States and Germany his illness would indefinitely prevent him from returning to his domicile in the United States and that it would be impossible for him to frustrate their plans, said defendants, Koehrman and Biggs, and said Brigham, impelled by motives of avarice, ambition and hatred toward Hermann Sielcken, and in furtherance and as a part of a fraudulent conspiracy (conceived among them during the spring and summer of 1917) illegally and wrongfully to acquire the control of said The Woolson Spice Company from said Hermann Sielcken, and otherwise to defraud him and to dominate, manage, control, manipulate and exploit said corporation in their own interests, caused to be held a pretended meeting of the Board of Directors of the defendant, The Woolson Spice Company, and by means of their control of the said Board of Directors in the absence of said Hermann Sielcken and without his knowledge or authority wrongfully and fraudulently ousted the said Hermann Sielcken from his office as President of defendant, The Woolson Spice Company, and also wrongfully and fraudulently ousted from his office as Treasurer of defendant, The Woolson Spice Company, one, S. P. Jermain, who, in his capacity as said Treasurer, for many years had been a trusted and loyal representative, associate and

adviser of the said Hermann Sielcken, and proceeded to a pretended election of the said Brigham as President of defendant, The Woolson Spice Company; that thereafter and at all times mentioned herein and as a result of the aforesaid wrongful acts, the defendants, Koehrman and Biggs, and said Brigham controlled and dominated the defendant, The Woolson Spice Company, and controlled and regulated the public and private reports of its business, general condition and ownership of its stock, and did fraudulently manipulate the defendant, The Woolson Spice Company, and the said reports for their own purposes, as [fol. 114] hereinafter more specifically set forth.

14. Plaintiff is informed and believes that in justification of their action in ousting Sielcken and seizing control of The Woolson Spice Company and as a further step in the consummation of the said fraudulent conspiracy, the defendants, Kiehrman and Biggs, and said Brigham, although they well knew that said Hermann Sielcken in his life time and at the time of his death was a citizen of the United States and domiciled in the City, County and State of New York and was not an enemy within the meaning of that term as defined in the "Trading with the Enemy Act", and although they well knew that said Hermann Sielcken had died on October 8, 1917, and that title to all his property in the United States had vested in The Columbia Trust Company as Executor, falsely and maliciously caused to be publicly announced and reported to the Alien Property Custodian that the said Hermann Sielcken was a resident of Germany and an enemy of the United States under the provisions of said "Trading with the Enemy Act", and that said Hermann Sielcken was the owner of the shares of stock of said Woolson Spice Company hereinbefore mentioned; that the said defendants and said Brigham, by said false and malicious reports, intended to conceal and distract attention from their wrongful and fraudulent seizure of the control of The Woolson Spice Company in their own interests and hoped thereby to perpetuate and render easier and less likely of discovery their management, control, manipulation, and exploitation of said corporation in their own interests.

15. That upon the qualification of the said Columbia Trust Company as Executor of the said Last Will and

Testament of the said Hermann Sielcken and for the purposes of the due administration and distribution of said estate, title to the said 824 shares of stock of the defend-
[fol. 115] ant, The Woolson Spice Company, and title to the interest of said Hermann Sielcken in said 360 shares of said stock, vested in said Columbia Trust Company as such executor.

16. Plaintiff is informed and believes that prior to or shortly after the appointment of The Columbia Trust Company as executor as aforesaid, the defendants, Koehrman and Biggs, and said Brigham broadened and enlarged the scope of their fraudulent conspiracy to include a plan to acquire the said 824 shares and the said 360 shares of the capital stock of the defendant, The Woolson Spice Company, for a grossly inadequate consideration for themselves and the defendants, Miller, Frank D. Stranahan and Robert A. Stranahan, to whom the said plan was communicated and who aided, abetted and participated in said fraudulent plan.

17. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy, wrongfully and illegally to acquire said stock at a grossly inadequate consideration, the defendants, Koehrman and Biggs, and said Brigham, aided and abetted by sundry other persons, and taking advantage of their wrongful control and domination over the affairs of the defendant, The Woolson Spice Company, and taking advantage of their peculiar and superior knowledge of the affairs of said Company and of the necessity of the said Executor to rely upon them for information concerning the business of said Company, carried on a campaign of misrepresentation calculated and designed to mislead and deceive the said Executor as to the value of said stock and as to the necessity of an immediate sale to avoid practically total loss. Plaintiff is further informed and believes that as part of said campaign of misrepresentation said individual defendants and said Brigham falsely and fraudulently misrepresented to said Columbia Trust Com-
[fol. 116] pany, as such Executor, that said stock was of small and constantly decreasing value, although in truth and in fact, as such defendants and said Brigham well knew, said stock was of a value of upwards of $2,000.00 per share and was constantly appreciating in value, that the fact that the Estate of Hermann Sielcken, who said defendants

falsely and wrongfully asserted had been an alien enemy, owned the said 824 shares of stock which had theretofore been transferred into the name of said Trust Company as such Executor, had seriously injured and was progressively injuring the business of the defendant, The Woolson Spice Company, that such circumstances had seriously depreciated and was progressively depreciating the value of said stock, that an immediate sale was necessary to save the business from destruction, that orders were being cancelled daily, that unless an immediate sale were made the said stock could not be sold at all and that only a very small amount would then be realized through liquidation. Plaintiff is further informed and believes that the individual defendants and said Brigham well knew that the business of the defendant, The Woolson Spice Company, had not been injured and depreciated, but on the contrary was in a very prosperous condition, that the volume of said business had largely increased over the preceding year, that said Company had large contracts for furnishing coffee, spices and supplies to the armies of the United States, that unusual profits were anticipated, and that said stock had not depreciated in value, but on the contrary, would, as the individual defendants and said Brigham well knew, be largely increased in value so soon as the secret knowledge of such defendants and said Brigham as to the increased business and the prosperity of the defendant, The Woolson Spice Company, should become known to the public generally. Plaintiff is further informed and believes that said false and wrongful misrepresentations were intended to [fol. 117] and did cause said Columbia Trust Company, as such Executor, which was unfamiliar with the affairs and business of said corporation, and which necessarily as a fiduciary stockholder of such corporation relied upon the reports, statements and representations of the defendants and said Brigham, who were the managing officers and directors of said corporation as aforesaid, as to the condition of its affairs, to believe that it would be impossible to secure a substantial price for the said stock, that said stock had greatly depreciated in value and was constantly depreciating in value, and that an immediate sale of said stock was necessary to avoid a total loss of said asset of the said estate. Plaintiff is further informed and believes that

as a result of the aforesaid misrepresentations so relied upon the Executor was fraudulently induced to sell said stock to the individual defendants and said Brigham for a grossly inadequate price, as hereinafter more particularly set forth.

18. Plaintiff is informed and believes that in furtherance of said conspiracy the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, falsely and fraudulently represented to and advised The Columbia Trust Company that any publicity regarding a sale of said shares or any attempt to obtain purchasers for said shares, other than said individual defendants and said Brigham, would react disastrously on the business of said Woolson Spice Company and the value of said shares; that thereby said Columbia Trust Company, as such Executor, was misled and induced to refrain from calling said shares to the attention of other persons who might be interested therein as purchasers and to refrain from advertising the fact that said shares of stock were for sale, and was thereby misled into making a hurried sale [fol. 118] of said shares to said defendants Koehrman, Biggs, Miller, Frank D. Stranahan and Robert A. Stranahan and to said Brigham, without competition, publicity or adequate advertising in the press, for a grossly inadequate price; that said defendants and said Brigham, who were the directors and managing officers of The Woolson Spice Company, and the other individual defendants associated with them in said fraudulent conspiracy, took advantage of the peculiar knowledge of said officers as to the prosperity of the defendant, The Woolson Spice Company, and the value of its stock, to acquire the shares of such fiduciary stockholder, The Columbia Trust Company, for a grossly inadequate price.

19. Plaintiff is informed and believes that in furtherance of said conspiracy the defendants, Koehrman and Biggs, and said Brigham conspiring among themselves and sundry other persons, falsely and fraudulently represented to and threatened The Columbia Trust Company that unless said shares were immediately sold to the individual defendants and said Brigham at a price fixed by them or if said shares were sold to any other person or persons, then they, the managing officers and directors of the defendant, The

Woolson Spice Company, would forthwith leave the employ of said corporation and involve it in immediate disaster and ruin; that thereby said Columbia Trust Company, as such executor, was misled and wrongfully coerced into making a hasty sale of said shares to the said individual defendants and to said Brigham at a grossly inadequate price fixed by them and upon their own terms and without attempting to obtain bids from other possible purchasers.

20. Plaintiff is informed and believes that as part of and in furtherance of said conspiracy to acquire said shares at a grossly inadequate price, the defendants, Koehrman and Biggs, and said Brigham falsely and fraudulently mis- [fol. 119] represented the condition of said Company to other prospective purchasers of said stock and attempted to and did effectively foreclose competition by such misrepresentation and by making threats to prospective purchasers that if such prospective purchasers competed with the individual defendants and said Brigham in the matter of the acquisition of said shares, then the management of the defendant, The Woolson Spice Company, would immediately quit and involve the corporation in chaos and ruin.

21. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy the defendants, Koehrman and Biggs, and said Brigham attempted to conceal from said Columbia Trust Company, and as officers and directors of defendant, The Woolson Spice Company, prevented said corporation from disclosing to The Columbia Trust Company the existence of an alleged claim in favor of the defendant, The Woolson Spice Company, or that said corporation asserted an alleged claim against the estate of Hermann Sielcken in a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00). Plaintiff is further informed and believes that when prior to the said sale of said shares of The Woolson Spice Company to the individual defendants and said Brigham, The Columbia Trust Company, as such Executor, learned of the existence of said alleged claim from other sources, said individual defendants and said Brigham falsely and fraudulently represented to and assured The Columbia Trust Company that said alleged claim had little if any merit and that a recovery thereon, if any, would be of a negligible amount, although said individual defendants and said Brigham then believed

they could and intended to take advantage of the death of [fol. 120] Hermann Sielcken, the circumstance that they were the sole survivors who had personal knowledge of many of the relations between the defendant, The Woolson Spice Company, and Hermann Sielcken in his life time, and their complete domination and control over the defendant, The Woolson Spice Company, its books, papers and records to enable said defendant, The Woolson Spice Company, through their connivance and assistance successfully to prosecute such alleged claim and recover from the estate of Hermann Sielcken a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00), and further falsely and fraudulently represented to and assured The Columbia Trust Company that neither they nor the defendant, The Woolson Spice Company, had any intention to assert said alleged claim against the estate of Hermann Sielcken, either presently or after the sale of said shares, although said individual defendants and said Brigham well knew that the defendant, The Woolson Spice Company, was at the time of such representations and assurances intending and planning to assert said claim as soon as the sale of said shares should be consummated, and although said individual defendants and said Brigham, as officers, directors, shareholders and prospective shareholders of defendant, The Woolson Spice Company, were at the time of making such representations and assurances intending to force and compel the defendant, The Woolson Spice Company, to assert said alleged claim as soon as the sale of said shares should be consummated. Plaintiff is further informed and believes that the individual defendants and said Brigham, by means of such and sundry other false and deceitful representations, assurances and advices, misled, induced and wrongfully prevailed upon The Columbia Trust Company as such Executor, to make a hurried sale of such shares to [fol. 121] the individual defendants and to said Brigham without asking an adequate or thorough investigation of said alleged claim, or without judicially determining or settling the same. Plaintiff is further informed and believes that said individual defendants and said Brigham so attempted to conceal such alleged claim, so prevented The Woolson Spice Company from divulging the same, made such false representations and deceitful assurances and caused said corporation to delay asserting said alleged

claim against the estate of said Hermann Sielcken until after the consummation of said sale in order that the value of said shares might not thereby be increased because of the existence of said alleged claim or by the fruits thereof, should the same be settled or judicially determined prior to said sale. Plaintiff is further informed and believes that the defendant, The Woolson Spice Company, aided and abetted the individual defendants and said Brigham in consummating said conspiracy to purchase the aforesaid shares for a grossly inadequate price, actively participated therein and delayed asserting said alleged claim against the estate of Hermann Sielcken in order that the individual defendants and said Brigham might acquire the controlling interest in said corporation prior to the assertion of said alleged claim, in the expectation and with the purpose of thereby more effectively prosecuting said claim against the estate of said Hermann Sielcken. Plaintiff is further informed and believes that subsequent to the sale of said shares the said individual defendants and said Brigham caused the defendant, The Woolson Spice Company, to assert and the said corporation did assert the said claim against the said estate and instituted an action in the Supreme Court of the State of New York against said Columbia Trust Company as such Executor, to recover said amount, and that thereafter such proceedings were had in the said action that said Columbia Trust Company, as such [fol. 122] executor, settled and compromised the said claim by the payment to the defendant, The Woolson Spice Company, of the sum of Two Hundred Eighty-four Thousand Six Hundred Eighty-nine and 16/100 Dollars ($284,689.16) from the funds of the estate, no part of which sum was taken into consideration on arriving at the value of said stock.

22. Plaintiff is informed and believes that, it being well known to said individual defendants and to said Brigham that certain loyal personal and business friends, associates and trusted advisers of the said Hermann Sielcken, including John Doyle, general counsel and former director of the defendant, The Woolson Spice Company, and Joseph Picksley, director and stockholder of The Woolson Spice Company, would exert their powers and influence to prevent a sale of said shares at the grossly inadequate price of ap-

proximately Six Hundred Eighty Dollars ($680.00) per share contemplated by said individual defendants and said Brigham and it being feared by said individual defendants and said Brigham that if said friends, associates and advisers of the said Hermann Sielcken were forewarned of said sale and said proposed price they might thwart said conspiracy by correctly informing the Columbia Trust Company as to the value of said shares and as to the existing and expected prosperity of The Woolson Spice Company, and by informing it of other persons who would be interested in purchasing said shares, the said individual defendants and said Brigham, in furtherance of said fraudulent plan to acquire said stock and conspiring among themselves and with sundry other persons, concealed from the said friends, associates and advisers of Hermann Sielcken the facts that said shares of stock were for sale and that they contemplated purchasing the same, the price which they planned to pay for said shares and all the details arranged in connection with said sale as hereinabove and hereinafter more specifically set forth, and by means of the aforesaid and sundry other false and deceitful misrepresentations, advices, assurances, concealments and threats, [fol. 123] induced The Columbia Trust Company, as such executor, to conceal said facts, price and details from the said friends, associates and advisers of Hermann Sielcken.

23. Plaintiff is informed and believes that in consummation of said conspiracy the individual defendants and said Brigham, aided and abetted by sundry other persons, by means of the aforesaid false and deceitful misrepresentations, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such Executor, to enter into a private agreement to sell said shares to the individual defendants and to said Brigham at the grossly inadequate price of $680.00 per share, although, as said defendants and said Brigham well knew, the market value of said stock was approximately $2,000.00 per share.

24. That thereafter, as plaintiff is informed and believes, the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, coerced and misled the Executor into consenting to a pretended auction sale (at which in fact competitive bidding had been

foreclosed as hereinafter set forth) for the purpose of concealing the private contract of purchase of said shares of The Woolson Spice Company which said individual defendants and said Brigham had obtained through the fraud, deception and coercion practiced upon said Executor and to create an appearance that said sale rested upon a public auction in the hopes of foreclosing inquiry into the private contracts of sale so effectuated through the fraud of said individual defendants and said Brigham.

25. Plaintiff is informed and believes that shortly prior to the 24th day of July, 1918, said individual defendants and said Brigham were advised by The Columbia Trust [fol. 124] Company that said 824 shares and said 360 shares would be put up for sale at auction in the City of New York on July 24, 1918, that thereupon in furtherance of said conspiracy and for the purpose of chilling the bidding at said auction sale, said individual defendants, said Brigham and sundry other persons, each of whom was a prospective bidder for said shares, and all of whom were aided and abetted by sundry other persons, wrongfully and fraudulently agreed among themselves that one of their number, to-wit, the defendant, Marion M. Miller, would bid for and purchase said shares without competition from the other individual defendants and said Brigham and said other persons and that upon the acquisition of said shares by the said Marion M. Miller, the same should be divided among said individual defendants, said Brigham and said other persons; that in compliance with said wrongful agreement the defendant, Marion M. Miller, attended said auction sale and purchased said shares without competition at a grossly inadequate price, said other individual defendants, said Brigham and other persons, in accordance with said agreement, refraining from bidding therefor, and that forthwith said shares were divided among the said conspirators as theretofore agreed upon.

26. Plaintiff is informed and believes that in order to further wrongfully chill the bidding at said auction sale said individual defendants and said Brigham conspiring among themselves and sundry other persons, by means of the aforesaid false and malicious representations, assurances, advices, concealments and threats, induced The Co-

lumbia Trust Company, as such Executor, to refrain from making any extensive or adequate advertising of said auction and to make certain special arrangements and agreements with them as to the terms of said auction sale, to-wit, that said individual defendants, and said Brigham were to be permitted to make a deposit of $100,000.00 with The Columbia Trust Company as a down payment on said shares [fol. 125] and were to be allowed thirty days after said auction within which to pay the balance of their purchase price, whereas, the public and all other prospective purchasers were to be required to deposit 10% of their bids with the auctioneer at the time of the sale, and to pay the balance thereof to such auctioneer before one o'clock on the day following said sale.

27. Plaintiff is informed and believes that on or about the 24th day of July, 1918, said Columbia Trust Company, as such Executor, misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of said individual defendants and said Brigham, put up the said 824 shares and said 360 shares at auction in the City of New York, and, without adequate notice or advertisement of said sale, sold said 824 shares and said 360 shares without competition to the defendant, Marion M. Miller, on behalf of himself and said other individual defendants and said Brigham, at the terms theretofore agreed upon as aforesaid at the price of Six Hundred Eighty Dollars ($680.00) per share, although the said individual defendants and said Brigham knew that the market value of said stock was approximately Two Thousand Dollars ($2,000.00) a share.

28. That thereafter the said Columbia Trust Company, as such Executor, still being misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of the individual defendants and said Brigham, caused to be presented to the defendant, The Woolson Spice Company, certificates for the said shares of stock, and said defendant, The Woolson Spice Company, with full knowledge that the transfer of said stock was the consummation of a gross fraud upon said Executor by the individual defendants and said Brigham, and with the expectation of deriving certain

improper and unjustifiable benefits therefrom, as hereinbefore more particularly set forth thereupon actively aided, [fol. 126] abetted and participated in the consummation of said fraud and wrongfully and illegally transferred said stock into the names of the individual defendants and said Brigham and/or their nominees and caused certificates therefor to be issued and delivered accordingly.

29. Plaintiff is informed and believes that prior to the purchase of said shares as aforesaid and in furtherance of said conspiracy to acquire the same at a grossly inadequate price, the said individual defendants and said Brigham having insufficient means with which to effect said purchase without assistance, knowing full well that the defendant, The Woolson Spice Company, was in a position to make a large cash distribution by way of dividends and/or to borrow large sums from sundry financial institutions, and taking advantage of their peculiar knowledge of the condition and affairs of the defendant, The Woolson Spice Company, and of their control and domination over said corporate defendant as aforesaid, conspired and arranged with the defendant, The Woolson Spice Company, and sundry other persons that upon the consummation of the aforesaid sale the defendant, The Woolson Spice Company, would procure and advance and/or distribute to the individual defendants and to said Brigham sufficient funds with which to pay for said shares; that the aforesaid arrangement was concealed from The Columbia Trust Company as such executor, it being led to believe by the individual defendants and said Brigham as aforesaid that the defendant, The Woolson Spice Company, was without excess assets and had a restricted and weak credit and that its prospective earning capacity was rapidly declining; that because of such concealments and misrepresentations The Columbia Trust Company, as such Executor, was induced to make said sale as hereinabove set forth; that shortly [fol. 127] after the sale of said shares as aforesaid and prior to the payment of the purchase price thereof, the defendant, The Woolson Spice Company, procured and distributed and/or advanced to the individual defendants and to said Brigham a sum or sums of money sufficient to pay the purchase price of said shares as theretofore arranged as aforesaid between the defendant, The Wool-

son Spice Company, and said individual defendants and said Brigham with the help and assistance of sundry other persons.

30. That since said issue and delivery of said certificates to said individual defendants and said Brigham and/or their nominees, the defendant The Woolson Spice Company has paid sundry dividends to said individual defendants, said Brigham, their nominees and transferees in stock and money, no part of which has been paid to the Executor of the estate of Hermann Sielcken or to any beneficiary of that estate; and that the plaintiff, as the residuary legatee and beneficiary of said estate, has been thereby deprived by the said fraud and wrongdoing of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, of the said 824 shares of stock and of the dividends declared and paid thereon, or of a large sum of money representing the fair market value of said stock and the amount or value of said dividends with interest from the date of payment.

31. That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date.

32. Plaintiff is ready, able and willing to pay to the defendants or any one of them, such sum or sums of money, if any, as this Court may determine is due and owing to [fol. 128] any or all of the individual defendants or to the defendant administrators of the estate of said Brigham, by reason of the payment by them and said Brigham of the aforementioned sums as purchasers of said shares, or plaintiff is ready and willing to have this Court set off against any sum which it may determine to be due and owing to plaintiff or to the Irving Trust Company, as such Executor, by any of the defendants any sum which the said defendants or said Brigham may have paid as purchasers of said stock.

33. That the plaintiff is without adequate remedy at law.

Wherefore the plaintiff prays:

1. That the defendant, The Woolson Spice Company, be required to account to the plaintiff for the said 824 shares of its common capital stock or such shares as the said 824 shares of stock may represent in any recapitalization of said Company which may have occurred since the sale of said 824 shares and register the plaintiff, upon its books as the owner of said stock, and issue to her certificates for said shares of stock.

2. That in the event that The Woolson Spice Company does not have in its treasury or under its control sufficient shares of stock to enable it to issue to the plaintiff certificates for said shares of stock, that the Court require the defendant, The Woolson Spice Company, the individual defendants herein and said defendant administrators, Ammi F. Mitchell and Leroy E. Eastman to pay to said plaintiff the reasonable value of said shares of stock or the reasonable value of such shares of stock as may be represented by said 824 shares in any recapitalization of said corporation.

3. That the defendant, The Woolson Spice Company, the individual defendants and said defendant administrators be required by the decree of this court to account to the plaintiff for all dividends which have accumulated and/or been paid upon said 824 shares of stock since July 25, 1918, [fol. 129] or upon any stock represented by said 824 shares of stock in any recapitalization of said corporation, together with interest upon said dividends from the date of payment thereof.

4. That the individual defendants, said defendant administrators and each of them be required by order of this Court to produce and surrender for cancellation any certificates issued in their names or in the name of William G. Brigham for any of said 824 shares of stock or for any shares of stock represented by said 824 shares in said recapitalization of said corporation.

5. That the individual defendants, said defendant administrators and the defendant, The Woolson Spice Company, be enjoined, except under order of this Court first having been obtained, from transferring any of its shares of stock or from issuing certificates for further shares of

stock and from changing in any way its present capital structure.

6. That the plaintiff have such other and further relief in the premises as the Court may deem meet and just.

(Signed) Baker, Hostetler, Sidlo & Patterson,
(Signed) Fraser, Hiett, Wall & Effler, Attorneys for the Plaintiff.

*Duly sworn to by Clara Sielcken-Schwarz. Jurat omitted in printing.*

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[fol. 130] In Court of Appeals of Lucas County, Ohio

Ex Parte Robert A. Stranahan

Writ of Habeas Corpus—Filed June 15, 1932

State of Ohio,
Lucas County, ss:

To Joseph Zimmerman, Sheriff of Lucas County, Ohio:

We command you that the body of Robert A. Stranahan, in your custody detained and restrained of his liberty, as it is said, you take and have before the Court of Appeals of Lucas County, Ohio, or before one of the judges of said court, at the courtroom of said court in the courthouse of said county, on the 15th day of June, 1932, at 9:30 A. M. o'clock, to do and receive what said court or said judge shall then and there consider, concerning him in that behalf; and have you then and there this writ.

In witness whereof, I, George E. Hardy, Clerk of said Court of Appeals, have hereunto set my hand and affixed the seal of said court this 14th day of June, 1932.

(Signed) Geo. E. Hardy, Clerk, by (Signed) M. E. Theuerkauff, Deputy Clerk. (Seal.)

Sheriff's Return

Received this writ June 14th, 1932, at 10:45 A. M., and pursuant to its command I do now have, this 15th day of June, 1932, at 9:30 A. M., the body of Robert A. Stranahan before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said John W. Koehrman in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by (Signed) Rolland Staggemeier, Deputy.

Costs $.91.

[fol. 131] For the "writ and commitment papers" attached to the foregoing Sheriff's Return, see the order of attachment of appellant, Robert A. Stranahan, which appears in full as an Exhibit to the pleading entitled "Petition for Writ of Habeas Corpus", at pages 102 to 103, supra, of this Transcript; and the subpœna upon this appellant, which appears in full as an Exhibit to the same pleading, at page 104, supra of this Transcript; both of which exhibits are here incorporated by reference thereto as fully as though repeated verbatim.

The Sheriff's Return of service of said order of attachment, endorsed thereon, is as follows:

Sheriff's Return

Received this writ June 13th, 1932, 11:25 A. M. and pursuant to its command I did attach the body of Robert A. Stranahan, June 14, 1932, and had him before William Purcell, Notary Public, Lucas County, Ohio, in the Court Room of the Court of Appeals, Lucas County, Ohio.

Joseph Zimmerman, Sheriff. Rolland Staggemeier, Deputy.

Costs $.91.

The Notary Public's return of service of said subpœna, endorsed thereon, is as follows:

State of Ohio,
Lucas County, ss:

William Purcell, being first duly sworn, says that on Tuesday, June 7th, 1932, at about three o'clock, P. M., he

served a copy of the within subpœna upon Robert A. Stranahan, personally, at the office of the Champion Spark Plug Company, Toledo, Ohio.

William Purcell.

Sworn to before me and subscribed in my presence [fol. 132] this 8th day of June, 1932. Fred M. Kramp, Notary Public, Lucas County, Ohio.

(Rubber stamp:) (Fred M. Kramp, Notary Public, Lucas County, Ohio.)

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[fol. 133] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. No. 2693

EX PARTE ROBERT A. STRANAHAN

RECOGNIZANCE—Filed June 17, 1932

THE STATE OF OHIO,
Lucas County, ss:

Be it remembered, that on June 14th, 1932, Robert A. Stranahan personally appeared before this court, and acknowledged himself to owe the State of Ohio the sum of One Hundred Dollars ($100.00), to be levied of his goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the above bound Robert A. Stranahan be and appear before this Court of Appeals, on the fifteenth day of June, 1932, and abide the judgment of this court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

(Signed) Robert A. Stranahan.

Taken and acknowledged before me, on the day and year above written. George E. Hardy, Clerk of the Court of Appeals.

[fol. 134] In Court of Appeals of Lucas County, Ohio

No. 2693

Ex Parte Robert A. Stranahan

Motion for New Trial—Filed June 22, 1932

Now comes the petitioner, Robert A. Stranahan, and moves the Court to vacate and set aside the findings and judgment of the Court herein and grant a new trial of this case, for the following reasons materially affecting the substantial rights of such petitioner:

(1) The Court erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) The Court erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of the Court are contrary to law.

(4) The finding, decision and judgment of the Court are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court are erroneous, in that there is no evidence to sustain them.

(6) The Court erred in not finding and adjudging that the order of attachment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) The Court erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give would be relevant or material to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the

provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

[fol. 135] (8) The Court erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing any attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety".

(10) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of

the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated".

(11) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power on notaries.

[fol. 136] (13) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) The Court erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require petitioner to attend as a witness or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) The Court erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) The Court erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and a denial of the right of redress in courts and of a remedy by due course of law in violation of Section 16 of Article I of the Constitution of the State of Ohio and were null and void.

(17) The Court erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States and were null and void.

[fol. 137] (18) The Court erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of

any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(19) The Court erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(20) The Court erred in other respects apparent on the face of the record.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner.

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[fol. 138] [File endorsement omitted]

In Court of Appeals of Lucas County

**Petitioner's Bill of Exceptions**

Filed June 23, 1932.
Notified, Waived.
Delivered to Hon. Harry W. Lloyd, ss.
Richards, Roy H. Williams, June 23-32.
Received from Hon. Harry W. Lloyd, ss.
Richards, Roy H. Williams, June 23-32.

[fol. 139] [Title omitted]

Appearances:

Messrs. Tracy, Chapman & Welles, by Messrs. George D. Welles and Harry S. Bugbee; Messrs. Marshall, Melhorn, Marlar & Martin, by Mr. Stuart S. Wall, for the Petitioner.
Messrs. Fraser, Hiett, Wall & Effler, by Mr. Harold W.

Fraser; Messrs. Baker, Hostetler, Sidlow & Patterson, by Mr. R. T. Jackson, for the Respondent.

Be it remembered that on the trial of the above entitled action and proceedings in the Court of Appeals, Lucas County, Ohio, in the May Term of said Court, A. D. 1932, said trial beginning on the 15th day of June, A. D. 1932, before the Honorables Harry W. Lloyd, Silas S. Richards and Roy H. Williams, Judges of the said Court, the following proceedings were had, viz:

COLLOQUY

Mr. Welles: Mr. Stranahan, one of the petitioners was here and by consent of counsel he has been permitted to go subject to return on call. Before proceeding with this case we would like, if Your Honor please, to have leave to file in each of the three pending cases of Ex Parte Koehrman, Ex Parte Bevan and Ex Parte Stranahan leave to file amendments to the petition for writs of habeas corpus. We have given counsel on the other side copies of the proposed amendment.

Judge Lloyd: They may be filed.

Objection; exception.

Mr. Welles: We should direct the court's attention to the fact that there is, as we are informed, no return or answer from the sheriff at this time. We assume that before we proceed there should be.

Mr. Fraser: If your Honors please, the sheriff is here with the bodies of these men and with his return and I [fol. 140] understand the practice is to hand you the return when he hands you the bodies.

Mr. Welles: I may be in error, but I understand that the return constituted an answer which raised such issues, if any, of fact as the sheriff thought proper to raise and that the question of the propriety of the custody really is dependent upon the return made by the sheriff, showing whether or not he does have legal custody.

Judge Lloyd: Have you the returns here? Let's see them.

Deputy Sheriff Staggemeier: Here they are (handing returns to the court).

Mr. Fraser: The return in each case is accompanied by the original papers under which the sheriff is holding these

men, as an exhibition to the court as to why he is holding them.

Judge Lloyd: I suppose we can go on with the hearing now.

Mr. Welles: May we see what the return says?

Judge Lloyd: Each is like the other. Here they are.

Mr. Welles: If your Honors please, in order to save time and get forward with this thing, we would like, with the court's permission, to save our objection to the return on the ground that it does not show any legal cause for the arrest or detention of any of the petitioners and without waiving that point we will proceed with the evidence, first making a statement. These three petitions for writs of habeas corpus arise by reason of writs issued by William Purcell, a notary public, in a case pending in the Court of Common Pleas of this county in which one Clara Sielcken Schwarz is the plaintiff and The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William A. Brigham, deceased, and The Irving Trust Company, a foreign trust company, as executor of the estate of Herman Sielcken, deceased, are named as defendants. The petitioner Bevan was served with a subpœna duces tecum, which is attached to his petition and he appeared before the notary and answered certain questions and then, upon the advice of his counsel, declined to answer [fol. 141] certain questions. Counsel for the defendants appeared at that occasion for the sole purpose, as shown by the record, of protesting and objecting to the taking of depositions on various grounds which I will come to in a moment. Petitioners Robert A. Stranahan and Frank D. Stranahan, were served with writs of attachment. I should say the petitioners Robert A. Stranahan and John W. Koehrman were served with writs of attachment, requiring them to appear before the same notary public to give testimony and directing the sheriff to produce them for that purpose there. The petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company, et al., is one in which the plaintiff alleges that she is residuary legatee of Herman Sielcken, deceased, and that The Irving Trust Company, a New York corporation, is the executor, still undischarged and acting under the will of Herman Sielcken, deceased. The petition attempts to charge a conspiracy alleged to

have been devised and carried out in the years 1917 and 1918 by the defendants Koehrman, Biggs, Miller, the two Stranahans, and W. A. Brigham, deceased, represented by Mitchell and Eastman as administrators. It is also charged that The Woolson Spice Company was a co-conspirator with the individual defendants. The petition attempts to charge that a sale of stock of The Woolson Spice Company by The Irving Trust Company as executor to the individual defendants, or some of them, was brought about by fraudulent representations or misrepresentations. The plaintiff seeks to have the sale of the stock in the amount of 824 shares of the old stock of The Woolson Spice Company set aside. She requests that the existing stock of The Woolson Spice Company issued in lieu of that should be transferred to her, that the corporation should be required to do so and that she may have an accounting and that she may receive all dividends, disbursements of every kind, which have been made by The Woolson Spice Company to the owners of this stock from the year 1918 down to the present time. The petition is very lengthy, it contains some twenty-eight pages, but the main point claimed and the main relief asked is as I have stated. The plaintiff seeks to excuse the long delay in the presentation of this claim and in the attempt to enforce it [fol. 142] by an allegation to this effect, it is paragraph 31 of the petition:

"That he said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date."

That is all that there is in the way of explanation or attempted explanation as to why this matter has been permitted to rest since 1918. As I have said, the theory of this petition is that there was a fraud, an actual fraud, committed by the defendants so attempted to be charged. But as your Honors will see when you come to examine the petition in the main case, nearly every allegation attempting to make any charge of wrongdoing I think, all except one, is made upon information and belief. The Irving Trust Company, it is alleged, upon demand having been made upon it to bring this suit as executor, declined

to do so and the attempt is therefore made to make it a party defendant as executor. We expect the evidence here will show that the Irving Trust Company as executor is not in this case in any way. The Irving Trust Company itself has been permitted to do business here but the Irving Trust Company as executor of the estate of Herman Sielcken is not in this state or admitted to do business here. A demurrer has been filed in the Court of Common Pleas to this petition by one of the defendants, namely Franklin H. Biggs, the grounds of the demurrer are: first, that the plaintiff has not legal capacity to sue, and second, that the petition does not state facts which show a cause of action.

Judge Lloyd: When was that filed, how long ago was that?

Mr. Welles: It was filed on June 11, 1932.

Judge Lloyd: I was wondering why it had not been heard.

Mr. Welles: I may say if it is important, the evidence here will be to the effect that we offered to have it heard immediately, prior to the going forward of these depositions or the attempt to go forward with them, and that counsel representing the plaintiff said they preferred to have that demurrer [fol. 143] heard in the usual and ordinary course. We filed a brief with the court with the number of points raised in the demurrer, and filed a copy of that with counsel for plaintiff. Then, third, that there is a misjoinder of parties defendant; fourth, that there is a defect of parties plaintiff; four-a, that there is a defect of parties defendant; fifth, that separate causes of action against several defendants are improperly joined; sixth, that the action was not brought within the time limit for the commencement of such an action, and seventh, that several causes of action are improperly joined. I may say we have been and are now ready to submit that demurrer to the Court of Common Pleas at any time, and have so advised counsel for plaintiff in the court below.

Judge Lloyd: Did counsel request oral argument? Unless the rule is changed, as soon as the demurrer is filed and briefs with it, the court goes ahead and decides it on its own initiative.

Mr. Welles: There has been no brief filed on behalf of plaintiff and their time has not expired, but in the meantime, as the evidence will show, an attempt was made to go forward with these depositions. Now, in addition to the fact that, if we are correct in our position on the demurrer,

the plaintiff has no legal capacity to sue and that there is no cause of action stated and that therefore there can be no material or relevant evidence of any sort obtained from any witness, therefore no witness can be required to answer any question. It further appears *that*, or will appear, that the notary public issued for the petitioner Bevan, who is the secretary and treasurer of The Woolson Spice Company, a subpœna duces tecum of a character which, under the authorities as we understand, constitutes an unreasonable search and seizure and which does not comply with the rule that requires reasonable description and specification of papers which it is sought to have produced by such subpœna. An example of the requirements of the subpœna is "all contracts and copies of contracts at any time entered into by you", this is in the Koehrman subpœna, "at any [fol. 144] time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company"; and skipping through, for instance, No. 5 "All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, and/or its successors and/or any of its officers, agents and directors, including George E. Warren and Willard V. King, from 1916 to 1932 inclusive". Regardless of the subject matter of the correspondence it is all required to be produced. And another one, No. 8, "Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive," regardless of the subject matter of such correspondence, so that it seemed to us and we so advised Messrs. Koehrman and Bevan, Mr. Bevan's subpœna duces tecum was of a similar character, that under the law and the Constitution that they were not required to undertake to move their files bodily up to the law office of Messrs. Fraser, Hiett & Effler, and that the subpœna so far as it attempted to require the production of the papers was, in our opinion, void and until this court or some other court would otherwise rule they need not obey it. Now, as I say, the evidence will show that we appeared specially at the taking of the depositions of Mr. Bevan and saved all of our objections to the procedure, but he nevertheless did answer some questions. Certain questions he was advised he need

not answer on the grounds which I have stated here, that the petition does not state a cause of action and plaintiff had no legal capacity to sue and the other grounds stated in the demurrer, that the subpœna duces tecum was illegal and void, and, accepting that advice, he declined to answer certain questions which, even if the petition did state a cause of action, I think under the rule laid down by this court in Poe v. Mathias, would be found to be wholly immaterial, and thereupon this order of commitment was issued. We think the evidence will show that the notary issued this order of commitment in the absence of the witness Bevan, in the absence of his counsel, without notice [fol. 145] to counsel or to Bevan, without opportunity to Bevan to be heard on the question as to whether he had committed a contempt or whether he was justified in refusing to answer the questions and produce the books and the notary purported to adjudge, using that word, that Bevan was in contempt and purported to adjudge that the questions asked him were material, as shown by the commitment papers signed by the notary himself. It will, as your Honors have seen at this time be our contention that there has been a violation of the constitutional rights of these plaintiffs both under the state statutes, numerous sections of which we will point out in our argument, under the fourteenth section of the Constitution of the United States, an attempt on the part of the notary to exercise judicial power, and the evidence will show that the notary has necessarily a pecuniary interest in attempting to force these witnesses to testify before him, since he is acting not only as notary but as stenographer and will get certain fees and compensation for writing the transcripts, and therefore he is disqualified from undertaking to decide whether this man should be put in jail, under a decision of the United States Supreme Court in the Toomey case and other similar cases. Mr. Wall has reminded me that the evidence will also show that there has been no service of summons upon Marion M. Miller, one of the defendants, and that the attempted service of summons upon the Irving Trust Company as executor is void and ineffective as service against it as executor; that there has been no service of notice of the taking of these depositions upon the defendant Marion M. Miller and no real legal service of notice of the taking upon

the Irving Trust Company as executor, and that, therefore, the case has not been placed in the posture required by the statutes for the taking of depositions, even though there were nothing else involved. I perhaps did indicate, but to make it clear, the opening statement is intended to apply to all three of the pending habeas corpus proceedings, Bevan, Stranahan and Koehrman, except in so far——

Judge Lloyd: I take it the questions involved are practically the same?

[fol. 146] Mr. Welles: Practically the same. There are one or two questions in the Bevan case arising by reason of the fact that some questions were asked him that do not arise in the Stranahan or Koehrman cases; otherwise the question is the same.

Mr. Fraser: Upon the last questions, if the court please, your Honors may want to consider this question, whether or not a witness who defies an order of a notary to appear and refuses to appear, and in answer to a subpœna appeared and refused to testify, anyway, whether that witness is in a position to raise these questions which Mr. Welles suggests. The only witness appearing was Mr. Bevan. Your Honors have observed from the statement of counsel this is a case involving a charge of an unlawful conspiracy entered into, secretly of course, by the defendants for the purpose of defrauding this estate. The petition is long in an attempt to set up the facts and after the statement of legal questions the facts are there and properly there under the authorities, we believe. We believe this plaintiff has a complete right and complete legal capacity to file and maintain this suit. How far your Honors will feel justified, in view of the decisions of this court, in examining into the technical sufficiency of this petition which is pending in the Court of Common Pleas and in which your Honors have no original jurisdiction to examine, will be discussed later as I have suggested. So far as the facts are concerned, on the sixth day of June a proper legal notice was served of the taking of depositions upon the thirteenth, was served upon counsel for these defendants who are now trying or appearing and who acknowledged service of that notice, and who appeared on the thirteenth with a witness Bevan. They were served with summons originally in the case on the second of June. Because of the fact that certain allegations in this petition

for habeas corpus, the court should be advised that upon the original notice served and original subpœnas the defendants, in order to frustrate us in the taking of depositions, applied to the Common Pleas Court for an injunction, their main contention being, as I understand, they wanted time to prepare the case, on the sixth of June. On [fol. 147] the sixth of June an agreement was made, a verbal agreement, that the depositions would be taken on the thirteenth. Thereupon new notices were served on Monday, the sixth, acknowledged and on the seventh, after service of those notices, the subpœnas were served on the defendants.

Judge Lloyd: Is this suit an action for damages or a suit in equity?

Mr. Fraser: Suit in equity, I rather think it is. It is a suit with alternative relief prayed for.

Judge Lloyd: If it is a suit in equity you could have a bill of discovery.

Mr. Fraser: That is doubtful under the Fairchild case. That case deals with the other question we have here, matter of materiality and matter of properly questioning—at any rate we have a legal right under the law, statutory right to take these depositions, and we think these gentlemen have no power to nullify that right. We think the court will be satisfied that these questions put to Mr. Bevan were material on the issues as presented in the petition. The subpœna duces tecum, to illustrate, we tried through Mr. Bevan, secretary and treasurer of the company, to produce the minute book. If that is not a correct description of the book, I don't know what is. He went on the stand and testified that he did have it but had turned it over to his counsel. Where it was now he didn't know. When he was on the stand we discovered that. Whether we will ever get the book, we don't know. We asked for the record of stock transfers, which are most material to this situation. This whole deal, as all these deals are, was concocted and carried out in the dark, with the lights all out, as these gentlemen always work, and work in secret. We wanted to find out what the minutes of this company showed, so I asked, we asked for the production of the minute book and it appears in the testimony of Bevan that there is one, but where it is we do not know, it was in his possession until the filing of this suit and he says it was turned over to his

counsel. We asked for the production of the record of the [fol. 148] payment of dividends since this time when we say this stock was fraudulently acquired and transferred. We asked for the record of the company showing the transfers of stock. It is obvious that this deal or transfer had been indirect and through many hands. That is the way those things are usually done, and we are entitled to know how. This man has testified that there are such records. In the subpœna duces tecum we only have to describe the document so the witness may know what is wanted and what is meant. If there is anything in the subpœna he doesn't know and can't ascertain the identity of, that can be taken care of when it is reached. In this examination of Mr. Bevan we tried to have him produce these things designated, which are perfectly plain. No one can doubt their identity. He refused to produce them under the advice of counsel. We believe, if the court please, under the authorities this is the rule which your Honors will apply, that if there is any reasonable probability or possibility, as some of the courts say, these matters being material in this case, the court will not deny us the right to ascertain those facts, even though it does involve the cross examination of a defendant. The statute was passed for that purpose and as the Supreme Court has said in many cases, particularly in the Fairchild case, we can not be required to wait until they are satisfied the time has arrived for our finding out these facts. It is a valuable right given by the statute and we insist now it is two weeks after the filing of the petition. They have secured that much delay and we are entitled to proceed in the examination of these people and ascertain the facts and ascertain other evidence. Now, there is an allegation here for example, made in the supplement, that Mr. Purcell is not disinterested. No answer, I think is filed, and I understand it is not necessary to file an answer. That allegation of course we challenge. They make a challenge that our effort wasn't in good faith, to take testimony. That allegation is challenged, and proof will be offered. But if your Honors' practice is to exclude evidence challenging and disproving allegations of that kind, somebody must have the right to file an answer. The suit as filed here is not plaintiff and defendant, as may be done, it is filed ex parte John Smith, ex parte Koehrman, and the sheriff produces the body and the return and shows

why he is holding these men. Whether the sheriff has any [fol. 149] right—he denies this charge of bad faith, he denies the officer was not authorized.

Mr. Welles: It is agreed in the Stranahan case that Mr. Robert A. Stranahan, the petitioner, would, if called as a witness, testify that he is in good health and that he expects to be present at the trial of this case if and when the case is tried on the merits.

Mr. Fraser: We make that stipulation notwithstanding the fact that on Monday Mr. Welles said Mr. Stranahan was ill and not feeling well.

Mr. Welles: As far as I know, that is the only thing we have been able to agree upon since this trial started.

Mr. Fraser: We can agree upon this, if the court please, that no service of summons has been made on Marion Miller. He is in California, and service here was residence service only and whether it was made, I don't know.

Judge Richards: Is he a necessary party?

Mr. Fraser: No.

Judge Richards: Is the Irving Trust Company?

A. No, I think not. But they have been served. Not only that, but have entered their appearance by acknowledgment of the deposition notice.

Mr. Wall: The sheriff's return on Miller shows "not found".

Mr. Fraser: Very well.

Mr. Welles: I understand you agree there has been no service on Marion Miller, either by summons or notice to take depositions?

Mr. Fraser: Yes, sir. And depositions when taken, we concede can not be used against the man who didn't have notice, but may be used against those served. These stipulations are made reserving our objections and exceptions to their materiality.

### Offers in Evidence

Mr. Welles: Any offer of evidence as made by us is subject to our objection that there is not sufficient showing by answer or return from the sheriff showing legal custody of any of the petitioners. We do offer in evidence the petition in the case of Clara Sielcken Schwarz v. The Woolson

Spice Company, and in order to avoid encumbering the record further, if it is satisfactory, the copy attached to [fol. 150] the amendments to the habeas corpus proceedings may be considered in evidence.

Mr. Fraser: It is also attached to the return of the sheriff. We do not object on the ground of identification.

Judge Lloyd: You may have your exceptions.

Mr. Welles: Without objection as to lack of certification?

Mr. Fraser: Yes.

Mr. Welles: We offer copy of the demurrer filed by defendant Franklin H. Biggs in the case of Schwarz v. Woolson Spice Co.

Mr. Fraser: Note an objection on the ground of materiality.

Mr. Welles: And marked Plaintiff's Exhibit No. 2, the petition should be marked Exhibit No. 1. In the Bevan case we offer in evidence the copy of the commitment which is attached to the petition, and which may be marked Exhibit No. 3A. We also offer the copies of the writs of attachment which are respectively attached to the petitions in the Stranahan case and in the Koehrman case, and which are marked Exhibit 3B and 3C respectively.

Mr. Fraser: The originals of those are likewise attached as a part of the sheriff's return of the writ of habeas corpus. Are those marked?

Mr. Welles: Those should be numbered in their own cases. We offer in evidence in each of the three cases Exhibit No. 3, which is a copy of the authority of the Irving Trust Company of New York to do business in the State of Ohio. If it is agreeable to counsel we will use a certified copy of it in one case and copies of that in the others.

Mr. Fraser: We are objecting to Exhibit No. 3 on the ground that The Irving Trust Company has already entered its appearance here.

(Overruled; exception.)

Mr. Welles: We also offer in evidence in each of the three cases Exhibit No. 4, which is a certified copy of the instrument filed by The Irving Trust Company with the secretary of state showing its authorized powers and the location of its office in this state and the name of its local representative, etc. We shall offer a certified copy in one case and copies of that in the others, if there is no objection.

[fol. 151] Mr. Fraser: Note our objection and exception.

Mr. Welles: We now offer in evidence in the Bevan case the subpoena duces tecum which was served on Mr. Bevan, marked "Plaintiff's Exhibit No. 7", in the Koehrman case the subpoena marked "Plaintiff's Exhibit No. 8", and in the Stranahan case the subpoena which was served on Mr. Stranahan, marked "Plaintiff's Exhibit No. 9", copies of each being attached to the original petitions for habeas corpus.

Mr. Fraser: Referring to the subpoenas served on the seventh of June?

Mr. Welles: Yes, the ones attached to the petition. No objection to the use of copies, is there?

Mr. Fraser: Not at all.

Mr. Welles: I would like to call Mr. Purcell the notary public.

Thereupon, WILLIAM PURCELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welles:

Q. Your name is William Purcell?

A. Yes, sir.

Q. Live in Lucas county, Ohio?

A. Yes, sir.

Q. Notary Public of that county?

A. Yes, sir.

Q. You are the William Purcell who issued the writ of commitment for C. N. Bevan and writs of attachment for Robert Stranahan and Koehrman?

A. I am.

Q. In the case of Schwarz v. Woolson Spice Company?

A. Yes, sir.

Q. Were you employed by somebody to act as notary and take or attempt to take depositions?

A. Yes, sir.

Q. Who employed you?

A. The firm of Fraser, Hiett, Wall and Effler directly.

Q. The same firm who are of counsel for Clara Sielcken Schwarz in the case mentioned?

A. Yes, sir.

[fol. 152] Q. Is it a fact that you originally signed subpœnas for Mr. John W. Koehrman and Mr. C. N. Bevan and Mr. Stranahan, directing them to appear before you to give testimony and produce books and papers, at a time when no petition in the case of Clara Schwarz v. Spice Company had been filed?

(Objection.)

Mr. Frazer: The notice which they acknowledged was upon the sixth of June, there was an earlier notice served on the day the case was filed, which was questioned before Judge Gosline on the sixth of June and at that time new notices were drawn and served.

Mr. Welles: I thought in view of some of the things Mr. Fraser had said about the history in the Court of Common Pleas——

Judge Lloyd: I don't think we are getting on——

Mr. Welles: Very well. Did you receive from anybody any acknowledgment or proof of service of notice of the taking of depositions before you set for June 13, 1932, in the cause of Schwarz v. Woolson Spice Company?

A. Yes sir.

Q. Do you have that with you?

A. No, sir.

Q. Do you have it there, Mr. Fraser?

Mr. Fraser: Yes.

Mr. Welles: May I see it. Now, Mr. Purcell, I show you a paper marked Plaintiff's Exhibit No. 6, is that the acknowledgment of service of notice of the taking of depositions just referred to by you?

A. Yes, sir.

Q. Have you any other acknowledgment of service of notice than that, referring to the June 13th proceedings?

A. No, sir.

Q. You have no return of service of notice of the taking of these depositions upon Irving Trust Company, executor?

A. None other except just this.

Q. Or upon Marion M. Miller?

A. No, sir.

Q. Neither one?

A. No sir.

Q. Have you any acknowledgment or proof of return or service of this notice or any notice upon Mitchell and Eastman?

(No answer.)

[fol. 153] Q. Mr. Purcell, I show you a copy of the subpœna duces tecum, which is attached to the original petition for writ of habeas corpus filed by C. N. Bevan, is that a copy of the subpœna duces tecum issued by you for Mr. Bevan?

A. I can't tell, Mr. Welles.

Q. Have you produced the original Bevan subpœna signed by you?

A. It wasn't given to me, sir. It was introduced in evidence. It was referred to but not marked as an exhibit at the taking of the deposition.

Q. Was it left in your possession?

A. No, sir.

Q. I show you paper marked Exhibit No. 7, is that the original subpœna signed by you for Mr. Bevan?

A. Yes, sir.

Q. Dated the seventh of June?

A. Yes, sir.

Q. Did you prepare that subpœna, or did counsel for plaintiff prepare it?

A. Counsel prepared it.

Q. Counsel prepared it for you?

A. Yes, sir.

Q. I show you the commitment addressed to Joseph Zimmerman, sheriff, directing him to arrest and commit C. N. Bevan to the jail of Lucas county, being a paper which is attached to the sheriff's return in the Bevan case, did you sign that commitment?

A. Yes, sir.

Q. Did you give Mr. Bevan any notice before you signed it that you were going to sign it?

(Objection; overruled; exception.)

A. No, sir.

Q. Did you give counsel for Mr. Bevan any notice that you were to sign a commitment for Mr. Bevan?

(Objection; overruled; exception.)

A. Yes, sir.

Q. Isn't what you said this: that if a commitment was presented to you, you would sign it?

A. No, Mr. Welles, I believe I said that I was going to sign one but I didn't think I would get it into the hands of the sheriff before morning.

Q. You gave counsel for plaintiff no notice of the time and place when you were to sign the commitment?

A. Counsel for plaintiff?

[fol. 154] Q. Counsel for Bevan?

A. Not of the exact time.

Q. Nor of the place?

Now, in your commitment appears the following:

"As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a notary public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a notary public, then and there for the said contempt of the said C. N. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the county jail until he submit to testify in the premises."

Now, isn't it a fact, Mr. Purcell, that at the time Mr. Bevan was present at the taking of his deposition, at the time he refused to answer questions, that you then and there adjudged that he was in contempt and ordered that he be committed?

(Objection; overruled.)

A. No, sir, I didn't at the exact moment.

Q. It was some hours later that you signed this commitment, wasn't it?

A. It was immediately at the conclusion of the taking of the depositions that commitments were decided upon and gotten up.

Q. It was some hours after Mr. Bevan had left the office before you signed this commitment?

A. Yes, sir.

Q. And you had no hearing, heard no arguments, received no evidence on the question as to whether Mr. Bevan

was in contempt or whether he had any justification or reasonable ground for refusing to answer?

(Objection; overruled; exception.)

A. No, sir.

Q. You served upon Mr. Bevan no notice, either verbal or in writing, of any charge which you were making against him, before you signed this order for his commitment?

(Objection; overruled; exception.)

A. No, sir.

[fol. 155] Mr. Fraser: May I have objections and *objections*, without interrupting?

Judge Lloyd: Yes, you may.

Mr. Welles: Your commitment further reads: "The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A"; did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues?

A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case?

A. Yes, sir.

Q. Are you a lawyer?

A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case?

A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right?

A. Yes, sir.

Q. I show you paper marked Plaintiff's Exhibit No. 8, is that the original subpœna signed by you under date of June 7th for John W. Koehrman?

A. Yes, sir.

Q. It is a fact that because Mr. Koehrman did not appear before you on June 7th that you then signed and delivered to the sheriff a writ of attachment, the original of which appears as a part of the sheriff's return?

(Objection; overruled; exception.)

A. No, sir.

Q. At whose request did you sign the writ of attachment for Mr. Koehrman, which is a part of the sheriff's return?

A. At the request of Mr. Fraser.

Q. What was the reason for signing it?

A. Because he didn't appear on the thirteenth day of June.

[fol. 156] Q. Is it a fact, Mr. Purcell, that on the morning of June 13, 1932, after you had undertaken to begin these depositions, that I stated before you, as shown by your transcript, without waiving any rights or submitting themselves to the jurisdiction of the notary, Mr. Koehrman will come over here and meet with you gentlemen whenever you are through with Mr. Bevan, who is now here?

A. Yes, sir.

Q. And was there, to your knowledge, any request thereafter made that Mr. Koehrman should come over that afternoon?

A. There was a request made that I issue an order of attachment immediately for Mr. Koehrman.

Q. You issued the order of attachment immediately upon that statement being made?

A. At the conclusion of the depositions.

Q. You didn't issue it right that morning, then?

A. Yes, sir.

Q. You didn't issue it right that morning then?

A. Yes, sir. As soon as we took the recess until afternoon.

Q. You issued the attachment for Mr.——

A. I am sure the attachment was in the hands of the sheriff before eleven thirty a. m.

Q. As far as you know, no further request was made that Mr. Koehrman should come there, except as you undertook to enforce his attendance by this writ of attachment?

A. Yes, sir.

Q. Is this Exhibit No. 9 the subpœna which you issued for Robert A. Stranahan?

A. It is one of the subpœnas.

Q. That is the one dated June 7th?

A. Yes, sir.

Q. Is the writ of attachment which is attached to the sheriff's return and marked Plaintiff's Exhibit No. 10 in the Stranahan case here, is it the one which you issued for the arrest of Mr. Stranahan?

A. Yes, sir.

Q. We offer in evidence each and all of the exhibits which have been called to the attention of Mr. Purcell, making an offer of each one separately.

(Objection; exception.)

Q. You were employed not only as a notary public but [fol. 157] also as a stenographer in the taking of these depositions of these three men whose petitions for habeas corpus are here, were you not?

A. Yes, sir.

Q. And you were acting as both notary and stenographer?

A. Yes, sir.

Q. Is it a fact that the amount of your compensation as a stenographer taking these depositions is dependent upon the number of pages of your notes which you transcribe and deliver to counsel for plaintiff?

A. Dependent upon the number of pages which we transcribe and deliver to all counsel.

Q. To any counsel, including counsel for the plaintiff?

A. Yes, sir.

Q. Do you receive any per diem as notary from counsel?

A. No, sir.

Q. Have no arrangement of that sort?

A. No, sir.

Q. Your compensation is contingent on the extent to which they testify before you?

A. Yes, sir.

Q. And the extent to which you transcribe the testimony, including the exhibits?

A. Yes, sir.

Q. And your employment as stenographer was by Messrs. Fraser, Hiett, Wall & Effler?

A. Yes, sir.

Q. In the taking of these depositions, I mean?

A. Yes, sir.

Q. What is your rate of compensation per page of typewritten transcripts of depositions or exhibits?

A. Based on the number of words. Twenty-five cents a hundred words, based on the statute.

Q. For the original copy?

A. Yes, sir.

Q. And you make a charge for furnishing carbons?

A. Yes sir.

Q. What rate?

A. The party ordering the original pays for their carbon copy ten cents a folio and opposing counsel pays fifteen cents.

Q. Were you in fact directed by Mr. Fraser or one of his firm to prepare an original typewritten transcript of these depositions?

A. I was directed to transcribe the testimony.

[fol. 158] Q. In typewriting?

A. Yes, sir.

Q. And to deliver how many copies to his office?

A. Deliver one carbon to his office and one carbon to Mr. Jackson.

Q. What were you to do with the original?

A. The original I took it for granted is to be kept in my office until signed and filed.

Cross-examination.

By Mr. Fraser:

Q. Mr. Purcell, before this morning, at any time in the proceedings, was any objection made by counsel for these defendants to your competency or qualifications?

A. Not to me.

Q. In your hearing?

A. Not that I know of.

Q. At the time of the taking of the testimony was anything said by Mr. Welles or any of counsel for defendants in any way questioning your qualifications or fairness or ability?

A. No, sir.

Q. In addition to employment by us to transcribe this testimony, were you also employed by counsel for the defendants to furnish them certain copies?

A. Yes, sir.

Q. Has that been done?

A. Yes, sir.

Q. Except to be paid by them for these copies?

A. Yes, sir.

Q. Practice in the taking of depositions is this, is it not, a deposition is taken and certain fees are taxed for the taking of the original?

A. Yes, sir.

Q. And returned and taxed as costs in the case and in many instances the counsel calling you advance those costs to you?

A. Yes, sir.

Q. Has that been the universal practice?

A. Yes, sir.

Q. How long have you been engaged in this work?

A. Sixteen years.

Q. Before issuing any of these writs of arrest or commitment, did you or did you not consult one of the judges of the Common Pleas Court of this county?

A. Yes, sir.

[fol. 159] Q. Which judge?

A. Judge Gosline.

Q. Were the writs issued after consultation with him?

A. Yes, sir.

Q. At the time that you were shown and had knowledge, personal knowledge of the original deposition notice served upon and acknowledged by Tracy, Chapman & Welles, were you told by me that service was also being made upon the Irving Trust Company's agent in Toledo?

A. Yes, sir.

Q. Were you also told that the original notice would be in the mail the next day?

A. I don't recall that.

Q. You never have seen that original notice?

A. No, sir.

Q. Acknowledged by them?

[fol. 160] Redirect examination.

By Mr. Welles:

Q. You don't mean that yon filed any formal application with the Court of Common Pleas for instructions or advice as to whether you should issue these writs of attachment or commitment?

A. No, sir.

Q. You didn't give counsel for defendant an opportunity to be heard and present any views they had as to why attachment or commitment should not issue?

A. No, sir.

Q. You simply went over and told Judge Gosline in substance that Mr. Fraser had asked you to issue writs of attachment or commitment or both and that because there was an application for injunction pending before him you wanted to find out whether it was all right to issue such writ?

A. In substance, that is it.

Q. He said, in substance, that the mere pendency of the application did not amount to one and you were at liberty to perform whatever your duties were in the premises?

A. Yes, sir.

Judge Williams: Was an attachment issued for the two witnesses who did not appear?

A. Yes, your Honor.

Q. And arrested under the writ of attachment?

A. Yes, your Honor.

Witness dismissed.

Mr. Welles: May it be conceded that Mr. Bevan, if called as a witness, would testify that he is in good health and expects to be present at the trial of the case of Clara Sielcken Schwarz v. The Woolson Spice Company in the Court of Common Pleas if and when it is tried, and resides in this county.

Mr. Fraser: Yes, I think he will testify to the same subject matter in his deposition, of course with our reservation of objection.

Mr. Welles: And the same thing as to Mr. Koehrman?

Mr. Fraser: Yes, with the same reservation.

Mr. Welles: We offer in evidence the several stipulations with respect to what the petitioners would testify to on these subjects.

[fol. 161] Mr. Fraser: Mr. Welles, will you stipulate that the young man who served this notice would testify that it was served upon Mr. Dexter, the man who appears to be the authorized agent of the Irving Trust Company?

Mr. Welles: You say you have a letter saying this was handed to Mr. Dexter?

Mr. Fraser: I have a statement over the telephone that this was served upon Mr. Dexter and he signed it, placed his signature on there acknowledging service.

Mr. Welles: I think we ought to have him here.

Mr. Fraser: I will make my professional statement that as soon as we can we will call him, bring evidence to show that. Mr. Welles, you don't question the signature of your firm appearing upon the original notice?

Mr. Welles: No.

Mr. Fraser: Exhibit No. 6.

Mr. Welles: No.

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Thereupon RAYMOND T. JACKSON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. Your name, please?

A. Raymond T. Jackson.

Q. You are a lawyer, Mr. Jackson?

A. Yes, sir.

Q. Member of what firm?

A. Member of the firm of Baker, Hostetler, Sidlo & Patterson of Cleveland.

Q. Their offices in the Union Trust Building?

A. Yes, 1956 Union Trust Building, Cleveland, Ohio.

Q. Have you been active in the preparation and filing of this law suit?

A. I have.

Q. And did you take part in the preparation of the various notices and subpœnas for depositions in this case?

A. Well, I was in contact with the preparation and was [fol. 162] asked to see that the notices be prepared. As far as our firm was concerned the work was physically done by Mr. Morley in cooperation with your office.

Q. Are you in a position to testify whether or not these depositions are being taken in good faith or in bad faith?

(Objection; overruled; exception.)

A. I am.

Q. What is the fact?

A. The depositions are being taken in good faith.

(Objection; overruled; exception.)

Q. What is the fact as to whether or not they will or will not be used in the trial of this Schwarz case?

(Objection; overruled; exceptions.)

A. Depositions are being taken with the intention that they shall be transcribed and filed in the Common Pleas Court of this county and that the depositions will be used by the plaintiff if any occasion under the statute should arise which will permit their use and if the witnesses, particularly those called for cross examination under the statute, testify to the truth.

Cross-examination.

By Mr. Welles:

Q. Mr. Jackson, it is a fact, is it not that the proposition has been made to you several times by counsel for certain of the defendants, including the three petitioners here, that you should agree that the demurrer in the Court of Common Pleas should be first heard before a deposition should be taken, so that we might know whether there is any right on anybody's part to take anybody's deposition?

A. I don't know whether any proposition of that kind exactly was made. I can state the facts as I understand [fol. 163] them, if you want me to do it.

Q. I would like to have you state whether, in substance, the suggestion was not made that we should hear the demurrer before taking the depositions?

A. I will say this, that counsel for the defendants sought an agreement to postpone the taking of the depositions until——

Mr. Welles: I object to his rambling around here and go into an irrelevant controversy in which he can make this speech he is trying to make.

A. A suggestion was made.

Q. You say it was made, a suggestion was made by me to you?

A. Yes.

Q. And declined by you?

A. That is right.

Q. And is it not a fact that we stated to you that we were willing to submit that demurrer immediately, at any time suiting the court's convenience and your convenience?

A. You so stated yesterday to me, Mr. Welles.

Q. Didn't we say, so state, at the time we were before Judge Gosline that we were intending to file a demurrer which we would submit?

A. You stated you intended to file a demurrer before Judge Gosline on June 6th and that you would be glad to expedite the hearing of the motion when and if it should be filed.

Q. It is a fact, is it not Mr. Jackson, that you first attempted to take these depositions by means of serving with the summons a notice to take depositions?

A. Well, they were served the same day. My understanding is that the summons were served first, I wasn't there.

Q. But they were entrusted to the sheriff to be served at or about the same time?

A. My understanding is that after the summons had been issued in the suit and delivered to the sheriff of this county, he was then given notice of taking depositions and certain subpœnas and directed to serve them in a certain way, [fol. 164] first the summons and then the notices and then the subpœnas. I wasn't here but that is my understanding.

Q. They were to be served upon the defendants direct, not upon counsel?

A. That is right, no counsel had appeared for them Mr. Welles.

Q. And they were served with or at approximately the same time, the subpœnas duces tecum, on the witnesses Bevan and Koehrman?

(Objection.)

Q. In order to shorten the thing, may it be admitted that the first attempt to take depositions in this case by plaintiff consisted of causing to be served upon certain of the defendants on the same day the summons was served upon those defendants, a notice to take depositions, service being made upon the second of June and notice to take depositions for the sixth of June, and that upon Bevan and Koehrman there were served by the sheriff at or about the same

time, at least on the same day, subpœnas duces tecum for the production of books and papers before the notary on June 6th.

Mr. Fraser: If that stipulation includes the service on the Irving Trust Company in substantially the same way, yes. I understand the order was first, service of summons upon the resident defendants, then notices to take depositions and in the instance of Mr. Bevan, who is not a defendant, he was served with a subpœna duces tecum after the summons on the defendants had been served and notices to take depositions. In Koehrman's, he was served first with summons, then with notice to take depositions, then with a subpœna duces tecum. This stipulation is made with the reservation.

Mr. Welles: There is no stipulation, then, because Mr. Fraser's additional language is quite contrary with what has been found in the Court of Common Pleas, and we can not agree with it. We will be glad to have the sheriff called and present the exact facts, but we do not think it is material.

[fol. 165] Judge Lloyd: And we agree with you.

Mr. Fraser: Mr. Jackson, referring to the cross examination with respect to any agreement made on June 6th with respect to hearing or taking depositions and filing and hearing of the demurrer, tell the court the substance of that talk?

(Objection; overruled; exception.)

A. On June 6th at the hearing before Judge Gosline it was suggested that the hearing of that pending motion be continued, and asked counsel if they could not agree on some method of going forward and in talking with Mr. Welles after the suggestion from Judge Gosline, I stated that we would be willing to postpone the consideration of the pending matter and go forward on the following Monday, June 13th, taking the depositions at Mr. Fraser's office that date having been suggested in conference by Judge Gosline. Mr. Welles asked for some time to confer with some one and then told me that that date would be acceptable and that no objection would be made that any demurrer was pending if the one should be filed, or any exceptions taken to the taking of the depositions, and with that conversation we said we would issue the new subpœnas and notices which are the ones involved in this proceeding.

Motion to strike out answer as irrelevant, overruled, exception.

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[fol. 166] Thereupon GEORGE D. WELLES testified as follows:

Mr. Wall: Will you state the substance of the conversation between you and Mr. Jackson on June 6th, regarding the time of taking the depositions?

A. Judge Gosline suggested a recess, and then invited us into his room and suggested we agree upon some date for taking these depositions. He finally said it ought to go about a week, he thought. I told him and Mr. Jackson was present, that we would consider it and let him and Mr. Jackson know. We did consider and consult and my arrangement with Mr. Jackson was this. I said to Mr. Jackson, in substance, that obviously we must preserve any rights we had to object to these depositions, but whether there was a delay or whether there was not a delay, we would waive no rights, we were going to rely upon every right we had and expected to file a demurrer, and that we expected to rely upon the fact that there was a demurrer pending. Mr. Jackson said to me, in substance, "does that mean you will object to the witness testifying at all, that you won't let them testify at all on the ground you have a demurrer pending?" and I said we wouldn't waive that objection, but these two witnesses, Koehrman and Bevan will appear and will submit to answering some questions, what questions or how many I wouldn't now say, but we shall reserve all rights. I afterwards went back to Mr. Jackson, before we went, a moment or two afterwards, and said to him I didn't want any misunderstanding about this, "I want you to understand we will waive no objection that we have."

Mr. Fraser: My statement as to what occurred there is in the depositions and on file. I don't think it is at all material.

Mr. Welles: If Mr. Fraser's statement is considered, I want Mr. Wall's statement considered also, if it is to be material.

Thereupon the court recessed for the noon hour, to reconvene at 1:30 o'clock p. m.

Mr. Welles: With the court's permission we would like to [fol. 167] reopen our evidence for the purpose only of offering one New York Court of Appeals decision and a section of the New York Statutes which we think bear upon the subject.

Judge Lloyd: Very well, you may put it in.

Mr. Fraser: Subject to our objection.

Mr. Welles: Your objection isn't because we are not proving the New York statute by some New York attorney?

Mr. Fraser: No.

Mr. Welles: We offer in evidence the opinion of the Court of Appeals of New York in the case of Harrington, Admr., etc., respondent, v. Eugene M. Keteltas, et al., appellants, 92 New York, beginning at page 40 and ending on page 50, called Exhibit No. 11, and we also offer from the New York Civil Practice, Cahill, 1927, the following subsection 5 of Section 20 of the Surrogate's Court Act.

Mr. Fraser: Objection and exception.

Mr. Welles: You aren't objecting to the manner of proof?

Mr. Fraser: No.

Mr. Welles: "The Surrogate in or out of court as the case may be has power: 5. To require by order an executor, administrator, testamentary trustee or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute or by the surrogate's court under authority of the statutes."

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Thereupon Raymond Adamski, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. What is your name, please?
A. Raymond Adamski.
Q. Where do you live?
A. 2601 Tate Avenue, Cleveland, Ohio.
Q. Are you employed somewhere?
A. Yes, sir.

Q. Where?

A. Law firm of Baker, Hostelter, Sidlo & Patterson.

[fol. 168] Q. What is your job?

A. Messenger.

Q. How long have you been there, how long have you worked there?

A. About a year and a half.

Q. Raymond, I show you paper which has been marked Defendants' Exhibit No. 1 in this case, did you ever see that?

A. Yes, sir.

Q. In connection with your work in Cleveland? Where did you first see it?

A. Mr. Morley handed it to me and told me to serve it on Mr. John Dexter.

Q. How many copies did he give you?

A. One original and one copy.

Q. Where did you go with them?

A. To the Society for Savings Bank Building.

Q. Whom did you inquire for?

A. I went to the guard at the Society for Savings Bank and asked for Mr. John Dexter. He told me there was a bank meeting and he would not be back until twelve, so I waited until about 12:15 and decided I would go to lunch and come back and catch him in, and I came back, I think it was about one o'clock, and I was just a few minutes late, he had gone out to lunch, and I went back and told Mr. Morley and said I would stop in and catch him on my way to court, and I went to his office then and the guard told me he was in and he pointed Mr. Dexter out to me and told me to go right over to him, so I went over to him and handed him the papers. At first I addressed him as Mr. Dexter, is this Mr. Dexter and he said yes and I handed him the papers. He looked them over and examined them and I told him to sign the copy and keep the original.

Q. Did he sign the copy?

A. Yes, sir.

Q. Did you see the name, J. H. Dexter, was that put on in your presence, Raymond?

A. Yes, sir.

Q. By whom was it signed?

A. By John H. Dexter.

Q. Was that all that occurred at that time?

A. Yes, sir.

Q. You left with him the original?

A. Yes, sir.

Q. And brought this with you and returned it to the office?

A. Yes, sir.

[fol. 169] Q. Since serving that paper, have you taken any steps to be more sure that it was Mr. Dexter who signed the paper?

A. Mr. Reeder took me down yesterday afternoon and introduced me to Mr. Dexter and it was the same man I served. He admitted it and said "are you the young man who served the papers?" and I said I was.

Witness dismissed.

COLLOQUY

Mr. Fraser: There are three papers I wanted marked as exhibits. If your Honors please, I offer in evidence a copy of Exhibit No. 4, being the original summons and return of the sheriff of Cuyahoga county of service upon the Irving Trust Company. For the sake of the record, if one is to be made, we desire to substitute a copy. And Defendants' Exhibit No. 3, which is a certified copy of the annual report returned to the Tax Commission of Ohio by The Irving Trust Company for 1931, certified over the signature of the secretary.

(Objection; overruled; exception.)

Mr. Fraser: And Defendants' Exhibit No. 2, which is a certified copy of the report rendered by the Irving Trust Company to the same body for the year 1932.

(Objection; overruled; exception.)

Mr. Welles: On the hearing yesterday, as I recall it, early in Mr. Purcell's examination I asked him in substance whether it wasn't a fact that he had signed the first set of subpœnas for the witnesses before the petition had been filed or any summons served, that is those calling for their appearance on June 6, 1932, and the court at that time ruled that that was immaterial and I don't think I made an offer to prove. I should like to offer to prove

that if permitted to answer he would say he signed these subpœnas before the petition was filed or summons issued.

Judge Lloyd: If I remember correctly, you stopped by saying you didn't think it was material and as I remember I said we agreed with you, and with that it was dropped. We want you to have in whatever you think you should have in here.

[fol. 170] Mr. Welles: Perhaps counsel can stipulate.

Mr. Fraser: Reserving our objection to the materiality, we stipulate that he would so testify.

Mr. Welles: And it is agreed that any evidence offered by either side in any one of the three cases shall be considered as having been offered in all three cases.

Mr. Fraser: Subject to the same objections.

Plaintiff and defendant rest.

The foregoing, together with the exhibits hereto attached, namely, Plaintiff's Exhibits Nos. 1, 2, 3, 3a, 3b, 3c, 4, and 6 to 11, inclusive, and Defendants' Exhibits Nos. 1 to 4, inclusive, (no exhibit being numbered 5 and no exhibit number 5 being offered by either party or received in evidence) contains all the evidence given, offered or received by the court on the trial of the above-entitled action and proceedings.

Thereafter on the twenty-second day of June, 1932, the court found and adjudged in favor of the defendant and respondent, Joseph Zimmerman, as sheriff of Lucas county, and against the petitioner, and ordered the writ of habeas corpus issued herein discharged and the petitioner remanded to the custody of the respondent, to all of which petitioner in open court objected and excepted. Within three days thereafter petitioner filed in this court his written motion for a new trial of this cause, for the reasons therein set forth. Said motion having thereupon come on for hearing and having been argued and submitted to the court, was overruled by the court; to which action and order of the court overruling his said motion, petitioner in open court duly excepted.

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### Order Settling Bill of Exceptions

And now comes the petitioner, by his counsel, and presents to the court this, his bill of exceptions, taken at said

trial of said cause, and prays that the same may be settled, allowed, signed and sealed by the court, and ordered made a part of the record in said cause; all of which is accordingly done on the twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge, S. S. Richards, Roy H. Williams, Judges, Court of Appeals.

[fol. 171] Received this bill of exceptions on this twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge, S. S. Richards, Roy H. Williams, Judges, Court of Appeals.

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[fol. 172] Statement re Plaintiff's Exhibit 1

Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants) appears in full at pages 108 to 129, supra, in this Transcript and is here incorporated by reference thereto, as fully as if repeated verbatim.

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[fols. 173 & 174] Plaintiff's Exhibit 2

In Court of Common Pleas of Lucas County, Ohio

No. 131,925

Clara Sielcken-Schwarz, Plaintiff,

vs.

The Woolson Spice Company, et al., Defendants

Demurrer of the Defendant, Franklin H. Biggs

Now comes the defendant Franklin H. Biggs and demurs to plaintiff's petition on the ground that it appears on its face:

1. That the plaintiff has not legal capacity to sue;

2. That the petition does not state facts which show a cause of action;

3. That there is a misjoinder of parties defendant;

4. That there is a defect of parties plaintiff;

4-a. That there is a defect of parties defendant;

5. That separate causes of action against defendants are improperly joined;

6. That the action was not brought within the time limited for the commencement of such actions;

7. That several causes of action are improperly joined.

Marshall, Melborn, Marlar & Martin and Tracy Chapman & Welles, Attorneys for said Defendant.

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[fols. 175 & 176] PLAINTIFF'S EXHIBIT 3

"Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930." Omitted in printing.

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[fol. 177] PLAINTIFF'S EXHIBIT #3A

(Notary's Order of Commitment of C. N. Bevan.)

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(PLAINTIFF'S EXHIBIT #3B

Plaintiff's Exhibit #3B (order of attachment of appellant, Robert A. Stranahan) appears in full at pages 102 to 103, supra, of this Transcript and is here incorporated by reference thereto, as fully as though repeated verbatim.

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PLAINTIFF'S EXHIBIT #3C

(Notary's Writ of attachment of John W. Koehrman.)

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[fols. 178-182] PLAINTIFF'S EXHIBIT 4.

"Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Section 178 and 183." Omitted in printing.

[fol. 183] PLAINTIFF'S EXHIBIT 6

COURT OF COMMON PLEAS

No. 131,925

STATE OF OHIO,
Lucas County:

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

NOTICE TO TAKE DEPOSITIONS

The defendants will take notice, that on Monday the 13th day of June, A. D. 1932, the plaintiff above named will take the depositions of sundry witnesses to be used as evidence on the trial of the above cause, at the office of Fraser, Hiett, Wall and Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, between the hours of nine-thirty (9:30) o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

June 6, 1932. Dated June 6, 1932.

Fraser, Hiett, Wall & Effler, Attorneys for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said deposition may be taken is hereby waived.

Tracy, Chapman & Welles, Attorneys for the Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan.

STATE OF OHIO,
County of Lucas, ss:

R. B. Swartzbaugh, being first duly sworn, says that on Monday, June 6, 1932, at about two thirty o'clock P. M., he served a copy of the within deposition notice upon Mr. Leroy Eastman, one of the Administrators of the Estate of William A. Brigham, deceased, and a member of the law firm

of Smith, Baker, Effler and Eastman, which firm are attorneys for Ammi F. Mitchell and Leroy Eastman, Administrators of the Estate of William A. Brigham, deceased.
[fol. 184] Mr. Eastman acknowledged service of notice verbally but declined to do so in writing, and declined to enter any appearance.

(Signed) R. B. Swartzbaugh.

Sworn to before me and subscribed in my presence this 7th day of June, 1932. (Signed) L. A. Wilhelm, Notary Public, Lucas County, Ohio. (Notarial Seal.)

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[fol. 185] PLAINTIFF'S EXHIBIT #7

(Subpœna Duces Tecum on C. N. Bevan.)

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PLAINTIFF'S EXHIBIT #8

(Subpœna Duces Tecum on John W. Koehrman.)

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PLAINTIFF'S EXHIBIT #9

Plaintiff's Exhibit #9 (subpœna upon appellant, Robert A. Stranahan) appears in full at pages 104 to ——, supra, of this Transcript, and is here incorporated by reference thereto, as fully as though repeated verbatim.

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PLAINTIFF'S EXHIBIT #10

Plaintiff's Exhibit #10 (order of attachment of appellant, Robert A. Stranahan) appears in full at pages 102 to 103, supra, of this transcript and is here incorporated by reference thereto, as fully as though repeated verbatim.

---

PLAINTIFF'S EXHIBIT #11

(Opinion of Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas et al., 92 N. Y. 40.)

[fol. 186] DEFENDANT'S EXHIBIT 1

THE STATE OF OHIO,
Lucas County, ss:

IN THE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF LUCAS AND STATE OF OHIO

Case No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

against

THE WOOLSON SPICE COMPANY et al., Defendants

The defendant, Irving Trust Company, Executor, will take notice, that on Monday, the 13th day of June, A. D. 1932, the above named plaintiff will take the depositions of John W. Koehrman, C. N. Bevan, Robert A. Stranahan, Frank D. Stranahan and sundry witnesses to be used as evidence on the trial of the above entitled cause, at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, in the City of Toledo, County of Lucas and State of Ohio, between the hours of 9:30 o'clock A. M. and 8 o'clock P. M., of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Baker, Hostetler, Sidlo & Patterson, Attorneys for Plaintiff.

I acknowledge service of the above notice, by copy, this 7th. day of June, A. D. 1932.

J. H. Dexter, Agent for Defendant, Irving Trust Company, Executor.

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[fols. 187–189] DEFENDANT'S EXHIBIT 2

"State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York." Omitted in printing.

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[fols. 190–192] DEFENDANT'S EXHIBIT 3

"State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York." Omitted in printing.

[fol. 193] DEFENDANT'S EXHIBIT 4

THE STATE OF OHIO,
Lucas County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify Irving Trust Company, a foreign corporation as executor of the last will and testament of Herman Sielcken, deceased, that it has been sued by Clara Sielcken-Schwarz in the Court of Common Pleas of Lucas County, and that unless it answer by the second day of July, 1932, the petition of said plaintiff against it filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the thirteenth day of June, A. D. 1932.

Witness Geo. E. Hardy, clerk of our said court, and the seal thereof hereto affixed, at Toledo, this second day of June, A. D. 1932.

Geo. E. Hardy, Clerk. M. E. Theuerkauff, Deputy Clerk.

THE STATE OF OHIO,
Cuyahoga County, ss:

Received this writ June 2, 1932, and pursuant to its command, on the second day of June, 1932, at 2:20 p. m. I served the defendant, Irving Trust Company, a foreign corporation, as executor of the last will and testament of Herman Sielcken, deceased, by delivering to John H. Dexter, the duly authorized and designated managing agent of said defendant within this state, and the person duly authorized and designated as provided by law upon whom process against said corporate defendant may be served within this state, a copy of the summons with all endorsements thereon.

John M. Sulzmann, Sheriff. Jas. M. Gallagher, Deputy.

[fol. 194] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. No. 2691

Ex Parte C. N. BEVAN

C. A. No. 2692

Ex Parte JOHN W. KOEHRMAN

C. A. No. 2693

Ex Parte ROBERT A. STRANAHAN

June 22nd, 1932

In Habeas Corpus

Messrs. Tracy, Chapman & Welles and Messrs. Marshall, Melhorn, Marlar & Martin for petitioners.

Messrs. Fraser, Hiett, Wall & Effler and Messrs. Baker, Hostetler, Sidlo & Patterson for respondents.

OPINION

WILLIAMS, J.:

These actions, founded on applications for writs of habeas corpus, are brought to secure the discharge of certain witnesses who were committed by a notary public for refusing to appear and to produce certain books and for refusing to testify in the taking of depositions in an action for equitable relief brought by Clara Sielcken-Schwarz, plaintiff, against The Woolson Spice Company and other defendants in the court of common pleas of Lucas County, Ohio. The petition in that cause was filed June 2, 1932, and summons was issued and served upon all of the defendants except Marion A. Miller, who could not be found within the county. On the same day, notice of taking depositions on behalf of plaintiff was served upon the same defendants, but no depositions were taken under this notice. A new notice was served upon the same defendants on June 6th, 1932, for the taking of depositions on June 13, 1932. Subpœnas to appear and testify and produce certain books and records were served upon the petitioners Bevan and Koehrman, and a simple subpœna upon the petitioner

Stranahan. Bevan appeared on June 13, 1932, and answered a few questions, but refused to answer others. He further refused to produce books and records described in his subpœna. Both Koehrman and Stranahan disobeyed [fol. 195] the subpœnas and failed to appear. For contempt in refusing to answer questions and in refusing to produce books, papers and documents, the notary public ordered that Bevan be imprisoned in the county jail until he should submit to testify, and he was held in custody under this order of the notary at the time he sued out the writ of habeas corpus. Attachments were issued for Koehrman and Stranahan and they were arrested and held thereunder at the time the writs of habeas corpus were sued out for their release.

Many reasons are presented why the petitioners should be discharged, and we will discuss these questions in their order.

In the first place it is contended that the questions asked the witness Bevan were not material. In the action brought in the court of common pleas the plaintiff charged certain of the defendants with conspiring to fraudulently acquire the stock of Herman Sielcken in The Woolson Spice Company at a price far below its true value by wrongfully ousting him as president during his temporary stay in Germany and unlawfully causing the stock to be sold. Many of the questions put to the witness Bevan, which he refused to answer, were proper and material, and well calculated to elicit testimony tending to prove the allegations of the petition, and the books and records required to be produced by the subpœna duces tecum served upon him would undoubtedly, if produced, have a material bearing on the matters under inquiry. This contention is therefore not well-founded.

It is also contended by petitioners that the petition filed in the common pleas court does not state a cause of action and the plaintiff does not have legal capacity to sue. As to the sufficiency of the petition, that is properly a question for the determination of the court in which the action is pending. However, in our judgment, depositions may be taken as a rule even though the petition does not state a cause of action, for it is not necessary that there should be an existing, as distinguished from a potential, issue of fact. It has even been held that they may be taken while

error proceedings are pending in the reviewing court. [fol. 196] Fairchild v. Lake Shore Electric Railway Co., 101 Ohio St., 261.

As to the legal capacity of plaintiff to sue, there are numerous authorities to the effect that where a personal representative of the decedent's estate refuses to bring an action for the collection of assets, an heir or devisee may bring the action and make the personal representative a party defendant.

24 C. J., 797, Sec. 1981;
11 R. C. L., 262, Sec. 297;
See annotations in 22 L. R. A., 458 and
20 Amer. & Eng. Anno. Cases, 96.

The subpœna duces tecum did not require the production of private and privileged papers, so far as the evidence discloses, and were not so indefinite that the parties upon whom they were served were justified in entirely ignoring them, nor is it a justification for refusing to obey a subpœna or to give testimony that witnesses are in good health and expect to be present at the trial.

In re Berger, 13 Ohio App., 206; affirmed 101 Ohio St., 512;
14 Ohio Jurisprudence, 10, Sec. 5;
Mathias vs. Poe, 20 Court of Appeals Opinions, Sixth District, unreported, 276.

The evidence adduced on hearing in this court shows that the depositions were being taken in good faith and we can not say that there was any ulterior motive or improper purpose in taking them. Section 11526, G. C., gives either party the right to commence taking testimony by deposition at any time after service upon the defendant, and this right has been recognized by our Supreme Court and no party should be deprived of it without good cause. In re Rauh, 65 Ohio St., 128.

The petitioners also make the novel contention that in attempting to punish for contempt the notary exercised judicial power in violation of Sec. 1 of Art. IV, Sec. 8 of Art. II and Section 32 of Art. II of the Constitution of Ohio, that Sections 11510, 11511 and 11512, G. C., are unconstitutional, if construed to give the notary power so to [fol. 197] adjudicate, that such attempted adjudication being made in the absence of the petitioner, without notice

to him, or hearing, and without him being present or represented by counsel, or having opportunity to know of the charge against him, was in violation of the Constitution of Ohio and the 14th amendment to the Constitution of the United States, and that the notary public was disqualified to sit in judgment upon the petitioners by reason of his personal pecuniary interest. It is a complete answer to the contention so made by the petitioners that the notary public, in committing the witness to jail for refusing to answer questions and in issuing an attachment for the witnesses who refused to respond to subpœna, does not exercise judicial power.

DeCamp vs. Archibald, 50 Ohio St., 618;
Benckenstein vs. Schott, 92 Ohio St., 29, 38.

Marion A. Miller was not served with process and is not a party to the suit, and may never be. In fact, there is no good reason why the cause may not be tried in the court of common pleas without obtaining service on Miller, as he does not seem to be a necessary party. However that may be, depositions may be used against parties who were served with notice and upon trial the depositions may be received against all defendants, if the one not receiving notice of the taking of them waives objection. Ryan vs. Conner, 40 Ohio St., 368.

At any rate, the plaintiff might properly proceed to take depositions, although Miller had not been served with notice.

Many of the questions raised would, if decided, require this court to anticipate decisions of the court of common pleas. Questions of the sufficiency of pleadings are, in the first instance at least, properly questions for the determination of the court in which the pleadings are filed. We can not decide in advance questions made in the court in which the original action pends, and what has been said is by way of argument only.

[fol. 198] We have no hesitancy in reaching the conclusion that the contentions of the petitioners are not well-founded and that the petitions should be dismissed.

Petitions dismissed.

Lloyd and Richards, JJ., concur.

Approved:

(Seal) Roy H. Williams, Judge.

[fol. 199] Certificate of lodgment omitted in printing.

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[fol. 200] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 201] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed March 20, 1933

The appellant in the above entitled cause states that the points upon which he intends to rely in this court in this case are as follows:

1. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property without due process of law".

2. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was arrested and deprived of his liberty [fol. 202] by a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Sec-

tion 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property without due process of law".

3. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512, and 11514, and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) [fol. 203] no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is

declared to be guilty of contempt and imprisoned by the order of the notary public.

4. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512, and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

5. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions that might be propounded to appellant were material to any issue in the case in which it was attempted to take said [fol. 204] depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appel-

lant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property without due process of law".

6. The Supreme Court of Ohio erred in not finding and adjudging tha. Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public, without regard to the materiality, relevancy or competency of such questions.

7. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amend- [fol. 205] ment to the Constitution of the United States, in that they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

8. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that

as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and imprisonment of this appellant by a notary public who, as in this case, was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

[fol. 206] 9. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and in finding and adjudging this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge, or to cause appellant's attachment and detention, by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law, in violation of Section 1 of the Fourteenth Amendment

to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

Appellant further states that only the following parts of the records as filed in this court, need be printed by the Clerk for the hearing of this case:

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| 4. Statement particularly disclosing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction to review the judgment of the Supreme Court of Ohio | 14–20 |
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| 6. Citation and proof of service | 25 |
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| 8. Statement to Respondent-Appellee re paragraph 3, Rule 12, of the Supreme Court of the United States and proof of service | 33–34 |
| 9. Appellee's Statement making against the Jurisdiction asserted by the Appellant | 36–58 |
| 10. Supersedeas and Appeal Bond | 60–61 |
| 11. Petition-in-error, in Supreme Court of Ohio | 62–67 |
| 12. Entry of Appearance, in Supreme Court of Ohio | 68 |
| 13. Journal Entry substituting Sheriff | 69 |
| 14. Motion for Stay of Execution and Advancement of Cause | 70–71 |
| 15. Order of Supreme Court of Ohio granting said motion for stay of execution and advancement of cause | 75 |
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| 19. Opinion of Supreme Court of Ohio and Certificate of Reporter | 79–93 |
| 20. Transcript of docket entries in Court of Appeals of Lucas County, Ohio | 94–95 |
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| 22. Petition for Writ of Habeas Corpus | 99–101 |
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| 27. Writ of habeas corpus and Sheriff's Return | 130 |
| 28. Page containing reference to "Writ and Commitment Papers" referred to in Sheriff's Return; Sheriff's Return to Order of Attachment; notary's return of service of subpœna | 131–132 |
| 29. Recognizance | 133 |
| 30. Motion for New Trial in Court of Appeals, Lucas County, Ohio | 134–137 |
| 31. Bill of Exceptions | 138–171 |
| 32. Page containing reference to plaintiff's Exhibit 1 (Petition for Equitable Relief) | 172 |
| 33. Demurrer of the defendant, Franklin H. Biggs | 173 |
| 34. Print only title of Plaintiff's Exhibit 3, as follows: "Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930" | 175 |
| 35. Page containing title of plaintiff's Exhibit 3A; reference to plaintiff's Exhibit 3B (order of attachment of Robert A. Stranahan); title of Plaintiff's Exhibit 3C | 177 |

| Title of paper | Record page |
|---|---|
| 36. Print only title of Plaintiff's Exhibit 4, as follows: "Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Section-178 and 183" | 178 |
| 37. Plaintiff's Exhibit 6 (Notice to take Depositions) and proof of service | 183–184 |
| 38. Page containing Titles of Plaintiff's Exhibits 7, 8 and 11; references to Plaintiff's Exhibit 9 (subpœna upon Robert A. Stranahan) and Plaintiff's Exhibit 10 (order of attachment of Robert A. Stranahan) | 185 |
| 39. Defendant's Exhibit 1 (Notice to take Depositions) | 186 |
| 40. Print only title of Defendant's Exhibit 2, "State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York" | 187 |
| [fols. 209 & 210] | |
| 41. Print only title of Defendant's Exhibit 3, "State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York" | 190 |
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Crary Davis, Geo. C. Welles, Counsel for Appellant.
Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

Dated March 17, 1933.

ACKNOWLEDGMENT OF SERVICE

Due service, and receipt of copy, of the appellant's foregoing Statement of Points to be relied upon and Designation of the Parts of the Record to be printed are acknowledged.

Newton D. Baker, Raymond T. Jackson, John C. Morley, Harold W. Fraser, Counsel for Appellee.

March 18th, 1933.

[fol. 211] [File endorsement omitted.]

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Endorsed on cover: File No. 37,483. Ohio Supreme Court. Term No. 786. Robert A. Stranahan, appellant, vs. David M. Krieger, as Sheriff of Lucas County, Ohio. Filed March 16, 1933. File No. 37,483.

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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

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# No. 784

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C. N. BEVAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

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## STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED BY THE PLAINTIFF IN ERROR (APPELLANT) THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF OHIO, AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

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Pursuant to paragraph 1, Rule 12, of the Supreme Court of the United States, plaintiff in error, Charles N. Bevan, who brought this suit under the name of

C. N. Bevan (appellant), presents and files this, his statement particularly disclosing the basis upon which it is contended by him that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Ohio desired to be appealed from:

A.

**Statutory Provision Sustaining Jurisdiction.**

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on appeal is the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 937; Jud. Code, Sec. 237; 28 U. S. C. A., Sec. 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.
> * * *";

as modified by the act of January 31, 1928, c. 14, Secs. 1 and 2 (45 Stat. 54), as amended April 26, 1928, c.

440, 45 Stat. 466 (28 U. S. C. A., Sec. 861*a* and 861*b*), which respectively provide:

> SEC. 861*a*. "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

> SEC. 861*b*. "The statutes regulating the right to a writ of eror, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

**Statutes of the State of Ohio the Validity of Which is Involved.**

The statutes of the State of Ohio the validity of which is involved are Ohio General Code, Sections 11497, 11503, 11510, 11511, 11512, and 11514, Vol. 3, The General Code of Ohio, 1910, pages 2465 to 2468, inclusive (Page's Annotated Ohio General Code, Vol. 2, pages 4732, 4735 to 4738; The Complete Ohio General Code, Page's Desk Ed., 1932, pages 2528, 2529; Throckmorton's Annotated Code of Ohio, 1929, pages 2890 to 2893). These sections provide as follows:

> "SEC. 11497. *Corporations; Officers May be Examined.*—At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may

be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony." (101 v. 139.)

"SEC. 11503. *What Subpœna to Contain.*—A subpœna shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence." (51 v. 57, Sec. 317.)

"SEC. 11510. *Contempt of Court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." (51 v. 57, Sec. 322.)

"SEC. 11511. *When Attachment May Issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served,

the court, by a rule, may order him to show cause why an attachment should not issue against him." (51 v. 57, Sec. 323.)

"SEC. 11512. *Punishment for Contempt.*—Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition. (77 v. 42, 45.)

"SEC. 11514. *How Witness Released from Imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (103 v. 405, 426.)

C.

**Date of Judgment Sought to be Reviewed and Date of Presentation of Application for Appeal.**

The judgment of the Supreme Court of Ohio desired to be appealed from was entered on the 25th day of January, 1933, and the application for appeal is presented and filed this 10th day of February, 1933.

**Nature of Case and Rulings of the Supreme Court of Ohio.**

This is a suit involving questions under the Federal Constitution as to the right of a State to empower

notaries public to imprison witnesses without judicial hearing or sanction. The action was begun in the Court of Appeals of Lucas County, Ohio, by plaintiff in error, C. N. Bevan, as petitioner, against the sheriff of Lucas County, Ohio, as respondent, to obtain petitioner's discharge from the custody of said sheriff. Petitioner had been committed as for contempt by a notary public for refusing to produce certain documentary evidence and to answer certain questions in the course of taking the deposition of petitioner for use in a civil action pending in the Court of Common Pleas of Lucas County, Ohio.

Petitioner was granted a writ of *habeas corpus* by the Court of Appeals for Lucas County, Ohio, which released petitioner on bail. On final hearing that court discharged the writ and remanded petitioner to the custody of the sheriff. Proceedings in error were filed and heard in the Supreme Court of Ohio, which affirmed the lower court, holding as hereinafter set forth.

In committing the petitioner the notary public purported to act under the Ohio General Code, Sections 11497, 11503, 11510 to 11512, inclusive, above quoted.

Under these sections as construed by the Supreme Court of Ohio, the notary *should* require a witness to answer only questions and produce only documentary evidence which are "pertinent to the issues tendered or made" and "in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceedings in chancery," *Ex Parte Jennings*, 60 O. S. 319 (1899); *Ex Parte Schoepf*, 74 O. S. 1 (1906) (syllabus).

But the notary, who is a mere "ministerial" or "executive" officer, has the *power* to order the imprisonment of a witness for refusal to answer incompetent, irrelevant or immaterial questions and for the refusal to produce wholly incompetent, irrelevant or immaterial documentary evidence. The witness may disobey such order only at his peril. *The notary public is not vested with power or jurisdiction to hear and determine any questions as to the competency, relevancy or materiality* of any evidence and may, *without determining any of these questions,* order a witness to be committed to jail until he answers. No opportunity is afforded by the Ohio statutes for *judicial review* of any such order *prior* to imprisonment. *DeCamp v. Archibald,* 50 O. S. 618 (1893); *Ex Parte Jennings,* 60 O. S. 319 (1899); *In re Rauh,* 65 O. S. 128 (1901); *Ex Parte Schoepf,* 74 O. S. 1 (1906). See also the opinion of the court in the instant case.

It thus appears that the question as to whether petitioner should be imprisoned is by the laws of Ohio left to the uncontrolled will of a ministerial or executive officer, who has neither power nor authority to determine what would be a proper exercise of his statutory power and whose decision to imprison or not to imprison depends upon nothing but his mere will.

The record in the instant case shows that when the petitioner was committed to the custody of the respondent the notary public did not in fact hold any hearing, hear any arguments, give the petitioner or his counsel any notice or opportunity to be heard and

did not undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material, but that *in the absence of petitioner and his counsel* the notary signed and issued the order of commitment, which had been prepared and was presented to him by counsel for the party seeking to take the deposition.

It further appears that the particular notary public in the case at bar would have been disqualified to adjudicate, if he had authority so to do, by reason of the fact that he was selected and employed by, and the continuance of his employment was at the will of, the party seeking to take the deposition, and the amount of his compensation was directly dependent upon the length of the deposition and the number of writings to be copied therein.

Petitioner maintained, and now maintains, that the above sections of the Ohio statutes and the operation thereof under the facts of this case are unconstitutional and void, and that he has been by the authority of the State of Ohio deprived of his liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

There is further involved in this case the question whether the purported subpœna *duces tecum* issued by the notary and served upon the petitioner was illegal and void and constituted an unreasonable search and seizure in violation of the Fourteenth Amendment to the Constitution of the United States.

In determining the questions presented the rulings of the Supreme Court of Ohio, as expressed in the

syllabus of the court, which under Rule VI of the Supreme Court of Ohio states the points of law decided, were as follows:

"1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

"2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. *DeCamp* v. *Archibald*, 50 Ohio St. 618, and *Benckenstein* v. *Schott*, 92 Ohio St. 29, approved and followed.

"3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege is preserved to him in the trial court.

"6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of *Tumey* v. *Ohio*, 273 U. S. 510, has no application whatever.

"7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this

character, the range of the testimony is wide and subpœnas *duces tecum,* which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures."

E.

**Cases Believed to Sustain Jurisdiction.**

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction on appeal of the Supreme Court of the United States:

*Weston et al.* v. *The City Council of Charleston,* 2 Pet. 449, 464 (1829).
*Tinsley* v. *Anderson,* 171 U. S. 101, 105 (1898).
*Bryant* v. *Zimmerman,* 278 U. S. 63, 70 (1928).
*Tumey* v. *Ohio,* 273 U. S. 510 (1927).

In addition, attention is invited to the memorandum opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *In the Matter of C. N. Bevan,* on Habeas Corpus, in which the Court said—

"If the Supreme Court of Ohio should decide the case (the instant case) presented to it adversely to appellant's contention, it is open to

them to seek a review of its decisions by the Supreme Court of the United States."

Respectfully submitted,

GEORGE D. WELLS,
CRARY DAVIS,
*Attorneys for Petitioner.*

STUART S. WALL,
THOMAS J. LYNCH,
HARRY S. BUGBEE,
*Of Counsel.*

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

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# No. 784

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C. N. BEVANS, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

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## APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

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NEWTON D. BAKER,
*Cleveland, Ohio,*
HAROLD W. FRASER,
*Toledo, Ohio,*
RAYMOND T. JACKSON,
*Cleveland, Ohio,*
JOHN C. MORLEY,
*Cleveland, Ohio,*
*Counsel for Appellee.*

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# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

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# No. 784

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C. N. BEVANS, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

---

## APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

---

### Nature of the Case.

This is an appeal from the final judgment of the Supreme Court of Ohio, which held that the appellant had been lawfully committed as for contempt. The appellant, who had been personally served with a subpœna *duces tecum* to appear and give his testimony by deposition in a civil suit pending in the Common Pleas Court of Lucas County, Ohio, was committed for contempt, until he should submit to appear and testify, for his refusal, *while making no claim of privi-*

*lege*, to produce any of the books or records described in his subpœna, though found by the examining officer to be material, and for his refusal to answer lawful questions on oral examination.

The testimony of the appellant was sought to be taken before a notary public, under the following statutory scheme of the State of Ohio for taking testimony by deposition in civil cases. For the convenience of the Court the pertinent sections of the Ohio General Code are printed in full in Appendix A hereof.

Section 11521* provides that the testimony of witnesses may be taken in any civil proceeding by deposition or oral examination. Section 11526 provides that "either party may commence taking *testimony* by deposition at any time after service upon the defendant." Section 11534 requires that notice of the taking of the deposition be given to the adverse party. Section 11535 prescribes the manner of notice and provides that the deposition shall only be used against such parties as shall have been given such notice. Section 11525 provides that such deposition shall not be used at the time of trial unless the witness is then absent, dead or infirm, or where the oral examination of the witness is not required. Section 11529 enumerates the officers authorized to take depositions and includes, among others, notary publics and judges. Sections 11502, 11503 and 11504 provide for the issu-

* All statutory references through this Statement, unless otherwise indicated, are to Sections of the Ohio General Code.

ance, form and service of subpœnas and subpœnas *duces tecum*. This, in brief, and so far as deemed material, is the legislative scheme for the taking of testimony by deposition in civil cases in Ohio.

Sections 11510, 11511 and 11512 provide for the enforcement of this method of taking testimony in civil cases in Ohio. In passing it may be noted that these Sections also cover the compulsion of oral testimony in open court. Section 11510 defines contempt as (1) disobedience of a subpœna; (2) refusal to be sworn; and (3) unlawful refusal to answer as a witness. The Section also provides that any such disobedience "may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." The last two species of contempt are necessarily committed in the presence of the examining magistrate and the statute authorizes their punishment without further citation or hearing. The contempt defined as disobedience of a subpœna is not committed in the presence of the examining magistrate; and Section 11511 provides that if the witness has been *personally served*, the examining magistrate *may* issue an attachment to bring the intended witness before the magistrate to answer for his contempt as well as to give testimony, but provides that in the absence of personal service, the magistrate must proceed by rule to show cause against the defaulting witness. Section 11512 provides as punishment that the recalcitrant witness may be imprisoned "until he submits to be sworn, testifies or gives his deposition."

The statutory scheme of the State for taking testimony by deposition is completed by Section 11514 of the Ohio General Code, which provides that a witness committed for contempt for refusal to appear, to be sworn or to testify may immediately apply to any one of the Judges of any of the courts of record of the State who may discharge the witness "if it appears that his imprisonment is *illegal*". Section 11514 thus provides a judicial review of the legality of a commitment or an attachment of a witness. *Decamp* v. *Archibald*, 50 O. S. 618 at 626, (Section 11514 of the Ohio General Code was formerly Section 5255 of the Revised Statutes of Ohio); *Benckenstein* v. *Schott*, 92 O. S. 29 at 41. This judicial review is not a mere remedy by *habeas corpus*. Under the Ohio statutes, as at common law, the remedy of *habeas corpus* is limited to testing the *jurisdiction* of the committing authority. (Section 12165). On the other hand, an application for release from imprisonment under Section 11514 tests not merely the jurisdiction of the committing magistrate but provides a full and free examination of the *legality* of the restraint without prejudice by reason of any action, finding or conclusion of the committing magistrate. It was under these statutes and this statutory scheme that the plaintiff in the Common Pleas suit sought to take the testimony of the Appellant Bevan.*

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* While the absence of a similar procedure in other States would furnish no ground for criticism of the statutory scheme for the administration of justice in Ohio, it is interesting and significant to note that the

Immediately following appellant's technical arrest on the commitment issued by the notary (R. 86, 159*) he applied to the Court of Appeals of Lucas County, Ohio, for his release from imprisonment as authorized by Ohio General Code, Sec. 11514 (R. 69, 101). After a full and complete review of the notary's action and the merits of appellant's objections, the Court of Appeals denied his release (R. 98, 222-226). To this judgment a writ of error was obtained from the Ohio Supreme Court and from the decision of that court

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*All references to the Record are to pages of the transcript in manuscript form.

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statutory scheme of Ohio for the compulsion of testimony by deposition or otherwise, is identical with, substantially the same, or very similar to the corresponding statutory procedure of many other States.

Statutes in the following States are identical with Ohio General Code, Sections 11510, 11511, 11512 and 11514:

*Kansas.*—Revised Statutes of Kansas, 1923, Chapter 60, Sections 2812, 2813, 2814, 2815, 2823.

*Nebraska.*—Compiled Statutes of Nebraska, 1929, Chapter 20, Sections 1229, 1230, 1231, Chapter 60, Section 107 (No section to correspond with O. G. C. Sec. 11514).

*Oklahoma.*—Oklahoma Statutes, 1931, Sections 278, 279, 280, 281, 296.

*South Dakota.*—Compiled Laws of South Dakota, 1929, Sections 2740, 2741, 2742, 2743, 2758.

*Wyoming.*—Wyoming Revised Statutes, 1931, Chapter 89, Sections 1715, 1716, 1717, 1718, 1805.

In the following states the corresponding statutes

affirming the Court of Appeals (R. 79, 81-94) the appellant now prosecutes this appeal to the Supreme Court of the United States.

During the interim between the judgment of the Lucas County Court of Appeals and the decision by the Ohio Supreme Court, the appellant attempted the collateral remedy of *habeas corpus* in the Federal courts. That collateral proceeding has already reached this Court and was disposed of on December 12, 1932. *Bevan* v. *Light*, October Term, 1932, No. 500, certiorari denied. For a detailed description of the numerous steps taken by the appellant to avoid

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are substantially to the same effect as Ohio General Code, Sections 11510, 11511 and 11512:

*Nevada.*—Nevada Compiled Laws, 1929, Sections 8985, 8987, 8988, 9002.

*Oregon.*—Oregon Code Annotated, 1930, Sections 9-1109, 9-1111, 9-1112, 9-1701, 9-2201.

*Utah.*—Compiled Laws of Utah, 1917, Sections 7133, 7135, 7136, 4253.

The following States have adopted similar statutory schemes which permit notaries or other non-judicial officers authorized to take depositions variously to summarily issue attachments or commit witnesses who disobey subpœnas or refuse to testify:

*Arizona.*—Revised Code of Arizona, 1928, Sections 4419, 4426, 4427.

*Arkansas.*—Digest and Statutes of Arkansas, 1921, Sections 4211, 4231, 4232.

*Connecticut.*—General Statutes of Connecticut, Revision of 1930, Section 5589.

*Florida.*—Compiled General Laws of Florida, 1927, Sections 4438, 4439.

and delay as long as possible his duty to testify, we respectfully refer the court to Respondent's Brief in Opposition to Petition for Certiorari, pp. 5-9, *Bevan* v. *Light*, October Term, 1932, No. 500.

The petition in the Common Pleas Court charges the defendants with a far-flung fraudulent conspiracy (R. 83, 84, 136-157). It is evident both from the objections first raised by counsel for the appellant at the commencement of the depositions (R. 108) and from the subsequent course followed by appellant that the real reason why appellant is now before this Court is not to procure his release from an imprisonment which he has never suffered but to continue, with all

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*Iowa.*—Code of Iowa, 1931, Sections 11341, 11358, 11359 and 12540 to 12551, inclusive.

*Louisiana.*—Marr's Revised Code of Practice of Louisiana, 1927. R. S. 615, page 361, and R. S. 618, page 362.

*Maine.*—Revised Statutes of Maine, 1930, Chapter 121, Sections 2 and 29.

*Michigan.*—Compiled Laws of Michigan, 1929, Sections 14228, 14229 and 14230.

*Mississippi.*—Mississippi Code, 1930, Section 1535.

*Missouri.*—Revised Statutes of Missouri, 1929, Sections 1756 and 1773.

*New Hampshire.*—Public Laws of New Hampshire, 1926, Chapter 336, Sections 4 and 7.

*Texas.*—Vernon's Annotated Texas Statutes, Title 55, Articles 3707, 3709, 3746, 3747, 3748.

*Vermont.*—General Laws of Vermont, 1917, Sections 1911, 1919, 1920, 1921.

*West Virginia.*—Official Code of West Virginia, 1931, Chapter 57, Article 4, Section 1; Chapter 57, Article 5, Sections 5 and 6.

the means at his command his effort to obstruct and delay the taking of depositions in the Common Pleas Court and the orderly administration of justice in the courts of Ohio. In short the real question here is not whether the appellant shall stand committed to jail, but whether the appellant may be compelled to give his testimony in the State courts in accordance with the procedure provided by the State for the administration of justice. The Supreme Court of Ohio has squarely decided that the plaintiff in the Common Pleas Court is entitled, as a matter of law, justice and right, to the testimony of the appellant and other defendants prosecuting sister appeals to this Court. Nevertheless the appellant now seeks further delays by raising sham and frivolous constitutional questions in a final attempt to obtain a review in this Court.

We respectfully submit that this Court should decline jurisdiction of this appeal upon the following grounds:

I. The claims of an unconstitutional exercise of authority under the Ohio statutes sustained below are not a basis of jurisdiction on appeal.

II. The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.

And in the event Appellant's Statement is treated as a petition for certiorari, we respectfully submit that:

III. The claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.

## REASONS AND AUTHORITIES MAKING AGAINST JURISDICTION.

### I.

**The jurisdiction of this Court to entertain this appeal is based exclusively on the holding of the Ohio Supreme Court that Sections 11510, 11511, 11512 and 11514 of the Ohio General Code are not in violation of the Federal Constitution; and the claims, were they meritorious, of an unconstitutional exercise of authority under these statutes are not a basis of juriisdiction on appeal.**

Inasmuch as there is no question involved in this case of the validity of any statute or treaty of the United States, the sole ground which can be asserted by the appellant to sustain the jurisdiction of this Court is the alleged repugnancy to the Federal Constitution of such statutes of Ohio as may have been sustained by the court below. The other claims of the appellant, assuming they could be considered as raising substantial Federal questions, do not as a matter of right, entitle the appellant to an appeal, but may only be addressed to the discretion of the Court on a petition for a writ of certiorari. *Judicial Code, Sec. 237*, 28 U. S. C. A. 344; *Zucht* v. *King*, 260 U. S. 174, 177. Therefore, the following contentions, irrespective of their substance, are improperly asserted as a basis of jurisdiction: (*a*) That appellant was deprived by the notary of notice and an opportunity to be heard; (*b*) that the notary was in fact disqualified on account of personal interest; (*c*) that the subpœna

*duces tecum* served upon the appellant and the order of the notary directing compliance therewith constituted an unreasonable search and seizure.

The appellant also apparently asserts that Sections 11497 and 11503 are unconstitutional as in violation of the Fourteenth Amendent (Appellant's Statement in Support of Jurisdiction, Section B, p. 3). While the contention is clearly without merit, it is, if advanced, being made for the first time in appellant's petition for, and assignment of errors on, this appeal. Since the claim was neither raised nor passed upon in the State courts, clearly it can furnish no basis of jurisdiction here. *Hulbert* v. *Chicago*, 202 U. S. 275, 280.

II.

**The attack on the Ohio Statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.**

To give the Supreme Court of the United States jurisdiction to review the judgment of a State court, the bare averment of a Federal question is not sufficient and if it appears that the claim of unconstitutionality is insubstantial, frivolous or fictitious, or that the appeal is prosecuted solely for delay, this Court will refuse to entertain jurisdiction, although a Federal question may in form be presented in the record. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Wilson* v. *North Caro-*

*lina*, 169 U. S. 586, 595; *Sawyer* v. *Piper*, 189 U. S. 154, 156; *Patterson* v. *Colorado*, 205 U. S. 454; *Parker* v. *McLain*, 237 U. S. 469, 471; *Union Pacific Railroad Co.* v. *Laughlin*, 247 U. S. 204; *Zucht* v. *King*, 260 U. S. 174, 177.

The power of the State of Ohio to require its citizens to give testimony in advance of trial in civil actions pending in its courts is not disputed by the appellant. It is only the machinery set up by the State for the carrying out of that power that is objected to. Granted the basic power of the State to enforce the duty of its citizens to testify in aid of the administration of civil justice, the particular mechanics adopted by the Legislature eighty years ago (Act of March 11, 1853, Ohio Laws, Chap. 1202, Sections 322-325) for the enforcement and administration of that basic power is a matter exclusively of internal interest and control. It should, therefore, require a case of clearly unreasonable procedural provisions to warrant the assumption of jurisdiction by the Supreme Court of the United States. *Twining* v. *New Jersey*, 211 U. S. 78, where it was stated at page 114:

> "* * * The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

A.

***The contention that Sections 11510, 11511 and 11512, according to their terms, fail to provide for notice and an opportunity to be heard in violation of the Fourteenth Amendment is without substance or merit.***

The analysis of Sections 11510, 11511 and 11512 (p. 3, *supra*) establishes that where a witness commits a contempt, as defined in the statute, in the presence of the examining officer, the witness may be committed without further citation or hearing. A contempt resulting from an unlawful refusal of a witness, who has appeared and been sworn, to answer or produce records on the order of the examining officer must necessarily be committed in the presence of the examining officer empowered to punish therefor, and it is elementary that under such circumstances due process does not require further notice or hearing. *Ex parte Terry*, 128 U. S. 289, 306; *McGrain* v. *Daugherty*, 273 U. S. 135, 157; *Blankenburg* v. *Commonwealth of Massachusetts*, 272 Mass. 25, 172 N. E. 209, 212, certiorari denied, 283 U. S. 819; *Middlebrook* v. *State*, 43 Conn. 257, 268, 269; *In re Willis*, 94 Wash. 180, 162 Pac. 38. There can be no question, therefore, but that the above sections, so far as they apply to the commitment of the appellant, are constitutional according to their terms.

B.

*The contention that the power to enforce testimony as conferred by Sections 11510, 11511 and 11512 upon non-judicial officers, is repugnant to the Fourteenth Amendment, is an attempt to reopen a question settled beyond dispute and is wholly without foundation.*

The further contention of the appellant that the notary, being a non-judicial officer, is without power to determine whether a contempt, as defined by such statutes, has been committed and that therefore the statutes violate the due process clause, is merely the old argument, somewhat refurbished, that a State may not delegate its enforcement powers to non-judicial officers and that due process requires judicial process. That such an argument is no longer tenable is beyond dispute. *Cafer, Sheriff*, v. *Caldwell*, 200 U. S. 293, 297; *Reetz* v. *Michigan*, 188 U. S. 505, 507; *Dreyer* v. *Illinois*, 187 U. S. 71, 84.

The bald and unsupported statement of appellant that the question as to whether the witness should be imprisoned is left to the uncontrolled will of the notary (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, page 7) is in the teeth of the express wording of Sections 11510, 11512, which limits the examining officer's power and jurisdiction to commitments for unlawful refusals to answer. Thus there is no question here of the conferring of an arbitrary, despotic or unlimited power upon an officer of the State. The possibility that either a court or officer may err has never been held to make it unconstitu-

tional to vest either with power. Nor do the Ohio decisions support the claim that a notary is without power to determine whether a contempt, as defined by the statute, has been committed. The fact is that the examining magistrate, whether a notary public or a judge (and he may be either under Section 11529), does not have power to pass upon whether the evidence taken on the deposition shall be admissible as between the parties to the action on the trial of the cause, that determination being reserved for the judge presiding over the trial. However, the examining magistrate, whether a notary public or a judge, does have the power to determine whether the witness has committed a contempt and to enforce the giving of his testimony on the deposition. *DeCamp* v. *Archibald*, 50 O. S. 618, 625; *Ex parte Jennings*, 60 O. S. 319, 328; *Ex parte Woodworth*, 6 Ohio Decisions 19, 21; 14 Ohio Jurisprudence 38; *Benckenstein* v. *Schott*, 92 O. S. 29. This is a familiar rule in Federal practice. *Nelson* v. *United States*, 201 U. S. 92, 114; *Dowagiac Mfg. Co.* v. *Lochren* (8 C. C. A.), 143 Fed. 211, 215.

The appellant, without claiming any privilege or asserting any reason other than advice of counsel (which, as stated by the Ohio Supreme Court (R. 88, 89), was no reason at all), flatly refused to give any testimony (R. 115-129). While we should regard the exercise of the statutory powers of a notary even in such a case to be clearly valid and as raising no Federal question, it is manifest that the appellant cannot raise the question and seek a declaratory judgment upon such a non-existent factual hypothesis, although

some of appellant's statements in support of jurisdiction could only thereby be made relevant.

C.

*While the full, free and untrammelled judicial review provided by Section 11514 is not necessary to afford due process, it is clear that the provision of such right of review cannot violate the Fourteenth Amendment, as appears to be alleged by appellant's statement in support of jurisdiction, but that it merely further evidences the care of the State to safeguard every legitimate right of a witness.*

The appellant includes Section 11514 as one of the statutes claimed to be unconstitutional (Appellant's Statement in Support of Jurisdiction, Sec. B, p. 3). It is settled that a right of appeal or review is not an essential element of due process. *Reetz* v. *Michigan*, 188 U. S. 505, 508. We have already seen that jurisdiction and power to punish for contempts, as defined in the statute, have been lawfully conferred upon a Notary Public. The provision for a review not merely of his jurisdiction but of the legality of his action was not essential to due process, but it does demonstrate the care with which the State has safeguarded every legitimate right of a witness. The appellant objects that this review does not precede the commitment of the examining officer (Appellant's Statement in Support of Jurisdiction, Sec. D, pp. 7-8). We know of no principle that when power is lawfully conferred upon any officer, it may not be exercised until his proposed action has first been reviewed by a court. How-

ever, the existence of this full, free and untrammelled review by application to any court of record in the State of Ohio does emphasize the reasonableness of the statutory scheme of Ohio for taking testimony by deposition in civil causes and does furnish a prompt and efficacious remedy for any error of the examining officer.

III.

**If appellant's "Statement Disclosing the Basis of Jurisdiction" be considered by this Court as a petition for a writ of certiorari, the claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.**

A.

*The proceedings before the Notary and the commitment of appellant did not deny him due process of law.*

The constitutionality of the statutory scheme provided by Sections 11510, 11511 and 11512 with respect to the requirements of notice and opportunity for hearing has already been shown, *supra* at page 12. The action of the notary was in strict conformance to those sections and satisfied every requirement of due process of law. The appellant suggests that neither he nor his counsel received notice or were given an opportunity to be heard, that the notary did not conduct a formal hearing as to whether the witness' deliberate refusal to testify or produce any of the material called for by the subpœna *duces tecum* constituted a contempt and that the notary signed and issued the com-

mitment in the absence of the appellant (Appellant's Statement Disclosing the Basis of Jurisdiction, page 8). As to these points the record discloses that the appellant appeared pursuant to the notice and order of a subpœna *duces tecum* personally served upon him, which closed with the words "Hereof fail not under penalty of the law" (R. 106). In disregard of the ample notice afforded by his subpœna and the oral command of the notary, appellant refused to testify or produce any of the records called for (R. 88, 89, 115-129). He attempted to show cause why he should not answer by stating that he refused on advice of counsel, and further through his counsel why he should not be required to answer or obey the subpœna *duces tecum* (R. 108, 109, 117). His contempt, as has hereinbefore been shown, was comitted in the presence of the magistrate authorized by law to commit him therefor without further citation or hearing. It is clear both on principle and authority that one committing a contempt under such circumstances cannot defeat the exercise of that power by leaving before process of commitment can be prepared or before he is apprehended by the sheriff or bailiff. *Ex parte Terry*, 128 U. S. 289, 311; see also page 12, *supra*. In the determination of whether the commitment of a witness for contempt committed in the face of the committing power without further notice or opportunity to be heard constitutes due process of law, it is manifestly immaterial whether the authority of the committing power so to punish for contempt rests upon a valid statute or is inherent.

Furthermore, in the instant case the appellant has had the benefit of a full, free and untrammelled review, pursuant to the provisions of Section 11514, by one of the State courts of appeals of Ohio and by the Supreme Court of Ohio and both courts have found that the examining officer proceeded in strict compliance with the law. Were such review essential, as it is not, it would properly be considered in determining the adequacy of the due process provided by the State. *Frank* v. *Mangum*, 237 U. S. 309, 327.

B.

*The suggestion that the Record discloses a disqualifying pecuniary interest of the notary is without basis in fact or law; but were such disqualifying interest assumed to exist, the Record would establish both that it was waived by the appellant and cured by the subsequent review.*

The notary had no disqualifying interest in fact. It was so found by the Supreme Court of Ohio (R. 82, 93). He is an official of the State, appointed for the express purpose of presiding at the taking of depositions, and it can no more be said that he is in the employ of the party calling upon him than that a judge to whom is submitted an application for a writ of *habeas corpus* or a motion for a restraining order is in the employ of the applicant therefor. He is compensated for the services actually performed; and his compensation for such services is no greater and no less whether or not he commits the witness. The suggestion that the length or extent of his services might be affected is fanciful and sustained by no authority.

The appellant appeared and was represented by counsel. He knew that the notary was taking the testimony and would transcribe it. His counsel ordered copies of the transcription (R. 186), and thus the "employment", if any, was mutual. The appellant and his counsel knew that under the laws of Ohio it would be the duty of the notary to order him to produce material records and answer material questions and to punish him for contempt if he failed to obey. The notary did order him to produce pertinent records and to answer material questions but neither he nor his counsel made any objection to the notary's qualifications.

This contention was first raised by appellant in his amended application to the State Court of Appeals (R. 133, 186). If the disqualification had in fact existed, as it did not, it was waived by failure to object. *State ex rel. Bowman* v. *Commissioners*, 124 O. S. 174; *Tari* v. *State*, 117 O. S. 481.

But if it be assumed that a disqualification did in fact exist and that it has not been waived, that circumstances did not deprive the notary of jurisdiction; and the subsequent hearing on the merits by a disinterested court under Section 11514, sought and obtained by the appellant, would have cured any such supposed defect and satisfied every requirement of due process of law. *Ex parte Meeks*, 20 Fed. (2d) 543; *Tari* v. *State*, 117 O. S. 481; *Hill* v. *State*, 298 S. W. 321, 174 Ark. 886; *Hitt* v. *State*, 115 So. 879, 149 Miss. 718; *Ex parte Lewis*, 288 Pac. 354 (Okla. 1930); *Brooks* v. *Town of Potomac*, 141 S. E. 249, 149 Va. 427.

C.

*The contention that the subpœna duces tecum, as an unreasonable search and seizure, violated the Fourteenth Amendment, is clearly untenable.*

The subpœna *duces tecum* as found by the Supreme Court of Ohio (R. 82, 92) does not constitute an unreasonable search and seizure in view of the broad scope and ramifications of the fraudulent conspiracy and the fraudulent misrepresentations set forth in the petition in the Common Pleas Court. The same view was taken by the State Court of Appeals (R. 224). However, even if the contrary be assumed for the sake of argument, it is clear that no Federal question is thereby presented. The personal rights, privileges and immunities set forth in the first eight Amendments of the Federal Constitution, including the safeguard against unreasonable searches and seizures provided in the Fourth Amendment, are not within the "privileges and immunities" covered by the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U. S. 78, 98, 99. And therefore an unreasonable search and seizure may be made by a State officer under State authority without violating the Federal Constitution. *Weeks* v. *United States*, 232 U. S. 383.

We respectfully submit that the record presents no substantial Federal question which would warrant this Court in taking jurisdiction and that the appeal has been taken for delay to frustrate the exercise of valuable rights by the Common Pleas plaintiff. Any

further delay subjects the Common Pleas plaintiff to the hazard if not probably to the loss of essential evidence. Under these circumstances justice as well as law requires a prompt refusal of jurisdiction.

Respectfully submitted,

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HAROLD W. FRASER,
RAYMOND T. JACKSON,
JOHN C. MORLEY,
*Counsel for Appellee.*

## APPENDIX A.

### Sections of the General Code of Ohio Involved, Cited or Discussed.

"Sec. 11497. *Corporations; officers may be examined.* At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony." (R. S. Sec. 5243.)

"Sec. 11502. *Subpœna on taking depositions.* When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer (R. S. Sec. 5248.)"

"Sec. 11503. *What subpœna to contain.*—A subpœna shall be directed to a person named therein and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence (R. S. Sec. 5247.)"

"Sec. 11504. *Service of subpœna.*—A subpœna may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed (R. S. Sec. 5246.)"

"Sec. 11510. *Contempt of court.* Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer

by whom the attendance or testimony of the witness is required (R. S. Sec. 5252.)"

"SEC. 11511. *When attachment may issue.* When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him (R. S. Sec. 5253.)"

"SEC. 11512. *Punishment for contempt.* Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition (R. S. Sec. 5254.)"

"SEC. 11514. *How witness released from imprisonment.* A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (R. S. Sec. 5255.)

"SEC. 11521. *How testimony taken.* The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination (R. S. Sec. 5261.)"

"SEC. 11525. *When deposition may be used.* The deposition of a witness may be used only when it is made to appear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of the witness is not required (R. S. Secs. 5265, 5281)."

"SEC. 11526. *What deposition taken.* Either party may commence taking testimony by deposition at any time after service upon the defendant (R. S. Sec. 5266)."

"SEC. 11529. *Officers authorized to take depositions.* Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission (R. S. Sec. 5269)."

"SEC. 11534. *Notice to take deposition.* Written notice of the intention to take a deposition shall be given to the adverse party, except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time when and place where it will be taken. In case the deposition of a party to the suit be taken, it shall not be used in his own behalf, unless the notice

specified that his deposition would be taken (R. S. Sec. 5273)."

"SEC. 11535. *Service of Notice.* Such notice must be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent. The deposition shall only be used against such parties as are served with notice in one of the modes prescribed. It also must be served so as to allow the adverse party time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice. If so stated in the notice, the examination may be adjourned from day to day (R. S. Sec. 5273.)"

"SEC. 11537. *By whom deposition written.* The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness (R. S. Sec. 5275.)"

SEC. 12165. *When writ not allowed.* If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate *had jurisdiction to issue the process,* render the judgment, *or make the order, the writ shall not be allowed;* or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order (R. S. Sec. 5729.)" (Italics ours.)

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HARRY S. HUGHES,
*Of Counsel.*

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SUPREME COURT OF THE UNITED STATES.
**OCTOBER TERM, 1932.**

# No. 785

JOHN W. KOEHRMAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

## STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED BY THE PLAINTIFF IN ERROR (APPELLANT) THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF OHIO, AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to paragraph 1, Rule 12, of the Supreme Court of the United States, plaintiff in error, John W.

Koehrman (appellant), presents and files this, his statement particularly disclosing the basis upon which it is contended by him that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Ohio desired to be appealed from:

A.

**Statutory Provision Sustaining Jurisdiction.**

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on appeal is the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 937; Jud. Code, Sec. 237; 28 U. S. C. A., Sec. 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> * * * * * * *

as modified by the Act of January 31, 1928, c. 14, Secs. 1 and 2 (45 Stat. 54), as amended April 26, 1928, c.

440, 45 Stat. 466 (28 U. S. C. A., Sec. 861*a* and 861*b*), which respectively provide:

> SEC. 861*a*. "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."
>
> SEC. 861*b*. "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

**Statutes of the State of Ohio the Validity of Which is Involved.**

The statutes of the State of Ohio the validity of which is involved are Ohio General Code, Sections 11497, 11503, 11510, 11511, 11512, and 11514, Vol. 3, The General Code of Ohio, 1910, pages 2465 to 2468, inclusive (Page's Annotated Ohio General Code, Vol. 2, pages 4732, 4735 to 4738; The Complete Ohio General Code, Page's Desk Ed., 1932, pages 2528, 2529; Throckmorton's Annotated Code of Ohio, 1929, pages 2890 to 2893). These sections provide as follows:

> "SEC. 11497. *Corporations; Officers May Be Examined.*—At the instance of the adverse party, a party may be examined as if under cross-examination, either orally, or by deposition, like any other witness. If the party be a

corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded, but may rebut it by counter testimony." (101 v. 139.)

"SEC. 11503. *What Subpœna to Contain.*—A subpœna shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence." (51 v. 57, Sec. 317.)

"SEC. 11510. *Contempt of Court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." (51 v. 57, Sec. 322.)

"SEC. 11511. *When Attachment May Issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the

back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him." (51 v. 57, Sec. 323.)

"SEC. 11512. *Punishment for Contempt.*—Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition." (77 v. 42, 45.)

"SEC. 11514. *How Witness Released from Imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (103 v. 405, 426.)

C.

**Date of Judgment Sought to be Reviewed and Date of Presentation of Application for Appeal.**

The judgment of the Supreme Court of Ohio desired to be appealed from was entered on the 25th day of January, 1933, and the application for appeal is presented and filed this 10th day of February, 1933.

D.

**Nature of Case and Rulings of the Supreme Court of Ohio.**

This is a suit involving questions under the Federal Constitution as to the right of a State to empower notaries public to imprison witnesses without judicial hearing or sanction. The action was begun in the Court of Appeals of Lucas County, Ohio, by plaintiff in error, John W. Koehrman, as petitioner, against the sheriff of Lucas County, Ohio, as respondent, to obtain petitioner's discharge from the custody of said sheriff. Petitioner had been arrested and attached to answer to a notary public for contempt in failing to appear to give his testimony and to produce certain documentary evidence in the course of taking depositions for use in a civil action pending in the Court of Common Pleas of Lucas County, Ohio.

Petitioner was granted a writ of habeas corpus by the Court of Appeals for Lucas County, Ohio, which released petitioner on bail. On final hearing that court discharged the writ and remanded petitioner to the custody of the sheriff. Proceedings in error were filed and heard in the Supreme Court of Ohio, which affirmed the lower court, holding as hereinafter set forth.

In ordering the arrest and attachment of the petitioner the notary public purported to act under the Ohio General Code, Sections 11497, 11503, 11510 to 11512, inclusive, above quoted.

Under these sections as construed by the Supreme Court of Ohio, the notary *should* require a witness to

answer only questions and produce only documentary evidence which are "pertinent to the issues tendered or made" and "in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceedings in chancery". *Ex Parte Jennings*, 60 O. S. 319 (1899); *Ex Parte Schoepf*, 74 O. S. 1 (1906) (syllabus). But the notary, who is a mere "ministerial" or "executive" officer, has the *power* to order the imprisonment of a witness for refusal to answer incompetent, irrelevant or immaterial questions and for the refusal to produce wholly incompetent, irrelevant or immaterial documentary evidence. The witness may disobey such order only at his peril. *The notary public is not vested with power or jurisdiction to hear and determine any questions as to the competency, relevancy or materiality of any evidence*, and may, *without determining any of these questions*, order a witness to be committed to jail until he answers. No opportunity is afforded by the Ohio statutes for *judicial review* of any such order *prior* to imprisonment. *De Camp* v. *Archibald*, 50 O. S. 618 (1893); *Ex Parte Jennings*, 60 O. S. 319 (1899); *In re Rauh*, 65 O. S. 128 (1901); *Ex Parte Schoepf*, 74 O. S. 1 (1906). See also the opinion of the court in the instant case.

It thus appears that the question as to whether petitioner should be imprisoned is by the laws of Ohio left to the uncontrolled will of a ministerial or executive officer, who has neither power nor authority to determine what would be a proper exercise of his statu-

tory power and whose decision to imprison or not to imprison depends upon nothing but his mere will.

The record in the instant case shows that when the petitioner was ordered to be taken into the custody of the respondent to answer to the notary public for his alleged contempt, the notary public did not hold any hearing, hear any arguments, give the petitioner or his counsel any notice or opportunity to be heard, but that *in the absence of petitioner and his counsel* the notary signed and issued the order of attachment, which had been prepared and was presented to him by counsel for the party seeking to take the deposition.

It further appears that the particular notary public in the case at bar would have been disqualified to adjudicate, if he had authority so to do, by reason of the fact that he was selected and employed by, and the continuance of his employment was at the will of, the party seeking to take the deposition, and the amount of his compensation was directly dependent upon the length of the deposition and the number of writings to be copied therein.

Petitioner maintained, and now maintains, that the above sections of the Ohio statutes and the operation thereof under the facts of this case are unconstitutional and void, and that he has been by the authority of the State of Ohio deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

There is further involved in this case the question whether the purported subpœna *duces tecum* issued by the notary and served upon the petitioner was illegal and void and constituted an unreasonable search and

seizure in violation of the Fourteenth Amendment to the Constitution of the United States.

In determining the questions presented the rulings of the Supreme Court of Ohio, as expressed in the syllabus of the court, which under Rule VI of the Supreme Court of Ohio states the points of law decided, were as follows:

> "1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.
>
> "2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. *DeCamp* v. *Archibald*, 50 Ohio St. 618, and *Benckenstein* v. *Schott*, 92 Ohio St. 29, approved and followed.
>
> "3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege is preserved to him in the trial court.
>
> * * * * * * *
>
> "6. The claim that a notary public has such an interest in the taking of depositions as dis-

qualifies him to act, is untenable, and the case of *Tumey* v. *Ohio*, 273 U. S. 510, has no application whatever.

"7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide and subpœnas *duces tecum*, which command that the entire correspondence file, records and documents of such corporation for many years back be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures."

E.

**Cases Believed to Sustain Jurisdiction.**

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction on appeal of the Supreme Court of the United States:

*Weston et al.* v. *The City Council of Charleston*, 2 Pet. 449, 464 (1829).

*Tinsley* v. *Anderson*, 171 U. S. 101, 105 (1898).

*Bryant* v. *Zimmerman*, 278 U. S. 63, 70 (1928).

*Tumey* v. *Ohio*, 273 U. S. 510 (1927).

In addition, attention is invited to the memorandum opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *In the Matter of C. N. Bevan, on Habeas Corpus*, in which the court said:

"If the Supreme Court of Ohio should decide the case (the instant case) presented to it adversely to appellant's contention, it is open to them to seek a review of its decisions by the Supreme Court of the United States."

Respectfully submitted,

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

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# No. 785

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JOHN W. KOEHRMAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

---

## APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

---

NEWTON D. BAKER,
*Cleveland, Ohio,*
HAROLD W. FRASER,
*Toledo, Ohio,*
RAYMOND T. JACKSON,
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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

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# No. 785

---

JOHN W. KOEHRMAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

---

## APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

---

### Nature of the Case.

This is an appeal from a final judgment of the Supreme Court of Ohio, which held that the appellant had been lawfully attached to answer for an alleged contempt. The appellant, who had been personally served with a subpœna *duces tecum* to appear before a notary public and give his testimony in a civil suit pending in the Common Pleas Court of Lucas County, Ohio, was attached for his disregard of and refusal to appear,

*while making no claim of privilege,* in response to such subpœna. The writ of attachment, issued by the notary pursuant to Section 11511, Ohio General Code, commanded the sheriff to attach the appellant and bring him before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action" (R. 105-106).* The appellant, as hereinafter appears, prevented the sheriff from bringing him before the examining officer for hearing as to whether his disobedience of the subpœna constituted contempt by precipitate and untimely resort to the courts.

The testimony of the appellant was sought to be taken before a notary public, under the following statutory scheme of the State of Ohio for taking testimony by deposition in civil cases. For the convenience of the Court the pertinent sections of the Ohio General Code are printed in full in Appendix A hereof.

Section 11521** provides that the testimony of witnesses may be taken in any civil proceeding by deposition or oral examination. Section 11526 provides that "either party may commence taking *testimony* by deposition at any time after service upon the defendant." Section 11534 requires that notice of the taking of the deposition be given to the adverse party. Sec-

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* All references to the record are to pages of the transcript in manuscript form.

** All statutory references throughout this statement, unless otherwise indicated, are to sections of the Ohio General Code.

tion 11535 prescribes the manner of notice and provides that the deposition shall only be used against such parties as shall have been given such notice. Section 11525 provides that such deposition shall not be used at the time of trial unless the witness is then absent, dead or infirm, or where the oral examination of the witness is not required. Section 11529 enumerates the officers authorized to take depositions and includes, among others, notary publics and judges. Sections 11502, 11503 and 11504 provide for the issuance, form and service of subpœnas and subpœnas *duces tecum*. This in brief and so far as deemed material is the legislative scheme for the taking of testimony by deposition in civil cases in Ohio.

Sections 11510, 11511 and 11512 provide for the enforcement of this method of taking testimony in civil cases in Ohio. In passing it may be noted that these sections also cover the compulsion of oral testimony in open court. Section 11510 defines contempt as (1) disobedience of a subpœna; (2) refusal to be sworn; and (3) unlawful refusal to answer as a witness. The section also provides that any such disobedience "may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." The last two species of contempt are necessarily committed in the presence of the examining magistrate and the statute authorizes their punishment without further citation or hearing. The contempt defined as disobedience of a subpœna is not committed in the presence of the examining magistrate; and Section 11511 provides that if the witness has been *personally*

*served*, the examining magistrate may issue an attachment to bring the intended witness before the magistrate to answer for his contempt as well as to give testimony, but provides that, in the absence of personal service, the magistrate must proceed by rule to show cause against the defaulting witness. Section 11512 provides as punishment that the recalcitrant witness may be imprisoned "until he submits to be sworn, testifies or gives his deposition."

The statutory scheme of the State for taking testimony by deposition is completed by Section 11514 of the Ohio General Code, which provides that a witness committed for contempt for refusal to appear, to be sworn or to testify may immediately apply to any one of the judges of any of the courts of record of the State who may discharge the witness "if it appears that his imprisonment is *illegal*." Section 11514 thus provides a judicial review of the legality of a commitment or an attachment of a witness. *DeCamp* v. *Archibald*, 50 O. S. 618 at 626 (Section 11514 of the Ohio General Code was formerly Section 5255 of the Revised Statutes of Ohio); *Benckenstein* v. *Schott*, 92 O. S. 29 at 41. This judicial review is not a mere remedy by *habeas corpus*. Under the Ohio statutes, as at common law, the remedy of *habeas corpus* is limited to testing the *jurisdiction* of the committing authority. (Section 12165.) On the other hand, an application for release from imprisonment under Section 11514 tests not merely the jurisdiction of the committing magistrate but provides a full and free examination of the *legality* of the restraint without prejudice by reason

of any action, finding or conclusion of the committing magistrate. It was under these statutes and this statutory scheme that the plaintiff in the Common Pleas suit sought to take the testimony of the Appellant Koehrman.*

Immediately following appellant's technical arrest on the attachment issued by the notary (R. 84), and before the sheriff had an opportunity to bring him before the notary for hearing to answer for his contempt, he applied to the Court of Appeals of Lucas

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* While the absence of a similar procedure in other States would furnish no ground for criticism of the statutory scheme for the administration of justice in Ohio, it is interesting and significant to note that the statutory scheme of Ohio for the compulsion of testimony by deposition or otherwise, is identical with, substantially the same, or very similar to the corresponding statutory procedure of many other States.

Statutes in the following States are identical with Ohio General Code, Sections 11510, 11511, 11512 and 11514:

*Kansas.*—Revised Statutes of Kansas, 1923, Chapter 60, Sections 2812, 2813, 2814, 2815, 2823.

*Nebraska.*—Compiled Statutes of Nebraska, 1929, Chapter 20, Sections 1229, 1230, 1231, Chapter 60, Section 107. (No section to correspond with O. G. C., Sec. 11514.)

*Oklahoma.*—Oklahoma Statutes, 1931, Sections 278, 279, 280, 281, 296.

*South Dakota.*—Compiled Laws of South Dakota, 1929, Sections 2740, 2741, 2742, 2743, 2758.

*Wyoming.*—Wyoming Revised Statutes, 1931, Chapter 89, Sections 1715, 1716, 1717, 1718, 1805.

County, Ohio, for his release from imprisonment as authorized by Ohio General Code, Sec. 11514 (R. 92-102). After a full and complete review of the notary's action the Court of Appeals denied his release (R. 96, 196-200). To this judgment a writ of error was obtained from the Ohio Supreme Court and from the decision of that court affirming the Court of Appeals (R. 79-82) the appellant now prosecutes this appeal to the Supreme Court of the United States.

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In the following States the corresponding statutes are substantially to the same effect as Ohio General Code, Sections 11510, 11511 and 11512.

*Nevada.*—Nevada Compiled Laws, 1929, Sections 8985, 8987, 8988, 9002.

*Oregon.*—Oregon Code Annotated, 1930, Sections 9-1109, 9-1111, 9-1112, 9-1701, 9-2201.

*Utah.*—Compiled Laws of Utah, 1917, Sections 7133, 7135, 7136, 4253.

The following States have adopted similar statutory schemes which permit notaries or other non-judicial officers authorized to take depositions variously to summarily issue attachments or commit witnesses who disobey subpœnas or refuse to testify:

*Arizona.*—Revised Code of Arizona, 1928, Sections 4419, 4426, 4427.

*Arkansas.*—Digest and Statutes of Arkansas, 1921, Sections 4211, 4231, 4232.

*Connecticut.*—General Statutes of Connecticut, Revision of 1930, Section 5589.

*Florida.*—Compiled General Laws of Florida, 1927, Sections 4438, 4439.

During the interim between the judgment of the Lucas County Court of Appeals and the decision by the Ohio Supreme Court, the appellant attempted the collateral remedy of *habeas corpus* in the Federal courts. That collateral proceeding has already reached this Court and was disposed of on December 12, 1932. *Kochrman* v. *Light*, October Term 1932, No. 501, certiorari denied. For a detailed description of the numerous steps taken by the appellant to avoid and delay as long as possible his duty to testify, we respectfully refer the Court to Respondent's Brief

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*Iowa.*—Code of Iowa, 1931, Sections 11341, 11358, 11359 and 12540 to 12551, inclusive.

*Louisiana.*—Marr's Revised Code of Practice of Louisiana, 1927. R. S. 615, page 361 and R. S. 618, page 362.

*Maine.*—Revised Statutes of Maine, 1930, Chapter 121, Sections 2 and 29.

*Michigan.*—Compiled Laws of Michigan, 1929, Sections 14228, 14229, 14230.

*Mississippi.*—Mississippi Code, 1930, Section 1535.

*Missouri.*—Revised Statutes of Missouri, 1929, Sections 1756 and 1773.

*New Hampshire.*—Public Laws of New Hampshire, 1926, Chapter 336, Sections 4 and 7.

*Texas.*—Vernon's Annotated Texas Statutes, Title 55, Articles 3707, 3709, 3746, 3747, 3748.

*Vermont.*—General Laws of Vermont, 1917, Sections 1911, 1919, 1920, 1921.

*West Virginia.*—Official Code of West Virginia, 1931, Chapter 57, Article 4, Section 1; Chapter 57, Article 5, Sections 5 and 6.

in Opposition to Petition for Certiorari, pp. 5-9, *Koehrman* v. *Light*, October Term 1932, No. 501.

The petition in the Common Pleas Court charges the defendants with a far-flung fraudulent conspiracy (R. 110-131). It is evident both from the objections first raised by counsel for the appellant at the commencement of the depositions and from the subsequent course followed by appellant that the real reason why appellant is now before this Court is not to procure his release from an imprisonment which he has never suffered, but to prevent a hearing before the proper officer and an adjudication as to the contempt charged and to continue, with all the means at his command, his effort to obstruct and delay the taking of depositions in the Common Pleas Court and the orderly administration of justice in the courts of Ohio. In short the real question here is not whether the appellant shall be imprisoned, but whether the appellant may avoid a hearing on the contempt charged and, if found guilty of such contempt, may be compelled to give his testimony in the State courts in accordance with the procedure provided by the State for the administration of justice. The Supreme Court of Ohio has squarely decided that the plaintiff in the Common Pleas Court is entitled, as a matter of law, justice and right, to the testimony of the appellant and other defendants prosecuting sister appeals to this Court. Nevertheless the appellant now seeks further delays by raising sham and frivolous constitutional questions in a final attempt to obtain a review in this Court.

We respectfully submit that this Court should decline jurisdiction of this appeal upon the following grounds:

I. The claims of an unconstitutional exercise of authority under the Ohio statutes sustained below are not a basis of jurisdiction on appeal.

II. The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.

And in the event appellant's statement is treated as a petition for certiorari, we respectfully submit that:

III. The claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.

## REASONS AND AUTHORITIES MAKING AGAINST JURISDICTION.

### I.

**The jurisdiction of this Court to entertain this appeal is based exclusively on the holding of the Ohio Supreme Court that Sections 11510, 11511, 11512 and 11514 of the Ohio General Code are not in violation of the Federal Constitution; and the claims, were they meritorious, of an unconstitutional exercise of authority under these statutes are not a basis of jurisdiction on appeal.**

Inasmuch as there is no question involved in this case of the validity of any statute or treaty of the United States, the sole ground which can be asserted

by the appellant to sustain the jurisdiction of this Court is the alleged repugnancy to the Federal Constitution of such statutes of Ohio as may have been sustained by the court below. The other claims of the appellant, assuming they could be considered as raising substantial Federal questions, do not as a matter of right entitle the appellant to an appeal, but may only be addressed to the discretion of the court on a petition for a writ of certiorari. *Judicial Code Sec. 237, 28 U. S. C. A. 344, Zucht* v. *King,* 260 U. S. 174, 177. Therefore the following contentions, irrespective of their substance, are improperly asserted as a basis of jurisdiction: (*a*) That appellant was deprived by the notary of notice and an opportunity to be heard; (*b*) That the notary was in fact disqualified on account of personal interest; (*c*) That the subpœna duces tecum served upon the appellant constituted an unreasonable search and seizure.

The appellant also apparently asserts that Sections 11497 and 11503 are unconstitutional as in violation of the Fourteenth Amendment (Appellant's Statement in Support of Jurisdiction, Section B, p. 3). While the contention is clearly without merit, it is, if advanced, being made for the first time in appellant's petition for, and assignment of errors, on this appeal. Since the claim was neither raised nor passed upon in the State courts, clearly it can furnish no basis of jurisdiction here. *Hulbert* v. *Chicago,* 202 U. S. 275, 280.

## II.

**The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.**

To give the Supreme Court of the United States jurisdiction to review the judgment of a State court, the bare averment of a Federal question is not sufficient and if it appears that the claim of unconstitutionality is insubstantial, frivolous or fictitious, or that the appeal is prosecuted solely for delay, this Court will refuse to entertain jurisdiction, although a Federal question may in form be presented in the record. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Wilson* v. *North Carolina*, 169 U. S. 586, 595; *Sawyer* v. *Piper*, 189 U. S. 154, 156; *Patterson* v. *Colorado*, 205 U. S. 454; *Parker* v. *McLain*, 237 U. S. 469, 471; *Union Pacific Railroad Co.* v. *Laughlin*, 247 U. S. 204; *Zucht* v. *King*, 260 U. S. 174, 177.

The power of the State of Ohio to require its citizens to give testimony in advance of trial in civil actions pending in its courts is not disputed by the appellant. It is only the machinery set up by the State for the carrying out of that power that is objected to. Granted the basic power of the State to enforce the duty of its citizens to testify in aid of the administration of civil justice, the particular mechanics adopted by the Legislature eighty years ago (Act of March

11, 1853, Ohio Laws, Chap. 1202, Sections 322-325) for the enforcement and administration of that basic power is a matter exclusively of internal interest and control. It should, therefore, require a case of clearly unreasonable procedural provisions to warrant the assumption of jurisdiction by the Supreme Court of the United States. *Twining* v. *New Jersey*, 211 U. S. 78, where it was stated at page 114:

> "* * * The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

A.

*The contention that Sections 11510, 11511 and 11512, according to their terms, fail to provide for notice and an opportunity to be heard in violation of the Fourteenth Amendment is without substance or merit.*

From the analysis of Sections 11510, 11511 and 11512 heretofore made (pages 3-4, *supra*), it is clear that such statutes provide that on failure of the witness to obey a subpœna personally served, the examining officer may issue an attachment commanding the sheriff to bring the recalcitrant witness before him to answer for the contempt. This is in strict accordance with every requirement of due process of law. It is well settled that where an intended witness fails to appear in obedience to process shown by the officer's return

to have been personally served, proceedings to punish for contempt may be initiated by issuance of attachment without further showing. *McGrain* v. *Daugherty*, 273 U. S. 135, 157; *Wilson* v. *State*, 57 Ind. 71, 73; *In re Steiner*, 195 Fed. 299, 302. The issuance of such an attachment and the arrest thereunder is not as a punishment for contempt, but for the purpose of initiating the proceedings and bringing the person before the court or magistrate to answer for the alleged contempt. Such process affords both notice and opportunity to be heard. There can be no question, therefore, that the above sections, so far as they apply to the attachment of the appellant, are constitutional according to their terms.

B.

*The contention that the power to enforce testimony, as conferred by Sections 11510, 11511 and 11512 upon non-judicial officers, is repugnant to the Fourteenth Amendment, is an attempt to reopen a question settled beyond dispute and is wholly without foundation.*

The further contention of the appellant that the notary, being a non-judicial officer, is without power to issue an attachment for the purpose of enforcing the attendance of a witness and initiating a contempt proceeding and that therefore the statutes violate the due process clause, is merely the old argument, somewhat refurbished, that a State may not delegate its enforcement powers to non-judicial officers and that due process requires judicial process. That such an argument is no longer tenable is beyond dispute. *Carfer, Sheriff*, v. *Caldwell*, 200 U. S. 293, 297; *Reetz*

v. *Michigan*, 188 U. S. 505, 507; *Dreyer* v. *Illinois*, 187 U. S. 71, 84.

However, this appellant, who refused to appear in response to his subpœna and to whom, therefore, no questions were put, can raise no question whether the exercise by a notary of the power to determine whether questions put to a witness are lawful and to commit for contempt for refusal to answer lawful questions, denies due process under the Federal Constitution. However, were such a question properly raised by the appellant, as it is not, it would clearly be without merit.

The bald and unsupported statement of appellant that the question as to whether the witness should be imprisoned is left to the uncontrolled will of the notary (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, pages 7-8) is in the teeth of the express wording of Sections 11510, 11512, which limits the examining officer's power and jurisdiction to commitments as specifically defined in the statutes. Thus there is no question here of the conferring of an arbitrary, despotic or unlimited power upon an officer of the State. The possibility that either a court or officer may err has never been held to make it unconstitutional to vest either with power. Nor do the Ohio decisions support the claim that a notary is without power to determine whether a contempt, as defined by the statute, has been committed. The fact is that the examining magistrate, whether a notary public or a judge (and he may be either under Section 11529), does not have power to pass upon whether the evidence taken on the deposition shall be admissible as between

the parties to the action on the trial of the cause, that determination being reserved for the judge presiding over the trial. However, the examining magistrate, whether a notary public or a judge, does have the power to determine whether the witness has committed a contempt and to enforce the giving of his testimony on the deposition. *DeCamp* v. *Archibald*, 50 O. S. 618, 625; *Ex Parte Jennings*, 60 O. S. 319, 328; *Ex Parte Woodworth*, 6 Ohio Decisions 19, 21; 14 Ohio Jurisprudence 38; *Benckenstein* v. *Schott*, 92 O. S. 29. This is a familiar rule in Federal practice. *Nelson* v. *United States*, 201 U. S. 92, 114; *Dowagiac Mfg. Co.* v. *Lochren* (8 C. C. A.), 143 Fed. 211, 215.

C.

*While the full, free and untrammelled judicial review provided by Section 11514 is not necessary to afford due process, it is clear that the provision of such right of review can not violate the Fourteenth Amendment, as appears to be alleged by appellant's statement in support of jurisdiction, but that it merely further evidences the care of the State to safeguard every legitimate right of a witness.*

The appellant includes Section 11514 as one of the statutes claimed to be unconstitutional. (Appellant's Statement in Support of Jurisdiction, Sec. B, p. 3.) It is settled that a right of appeal or review is not an essential element of due process. *Reetz* v. *Michigan*, 188 U. S. 505, 508. We have already seen that jurisdiction and power to attach and punish for contempt, as defined in the statute, have been lawfully conferred upon

a notary public. The provision for a review not merely of his jurisdiction but of the legality of his action was not essential to due process, but it does demonstrate the care with which the State has safeguarded every legitimate right of a witness. The appellant objects that this review does not precede his attachment to answer for the contempt charged. (Appellant's Statement in Support of Jurisdiction, Sec. D, p. 8.) We know of no principle that when power is lawfully conferred upon any officer it may not be exercised until his proposed action has first been reviewed by a court. The appellant's contention here is not merely that an officer authorized to compel attendance and testimony may not issue a writ of attachment to initiate contempt proceedings for disobedience of a subpoena shown to have been personally served, without a preliminary hearing voluntarily attended by the recalcitrant witness (shown to be wholly without merit at page 8, *supra*), but that such an officer under such circumstances may not issue a writ of attachment to initiate such contempt proceedings without a previous adjudication by a court. The mere statement of the contention refutes it.

However, the existence of this full, free and untrammelled review by application to any court of record in the State of Ohio does emphasize the reasonableness of the statutory scheme of Ohio for taking testimony by deposition in civil causes and does furnish a prompt and efficacious remedy for any error of the examining officer.

## III.

**If appellant's "statement disclosing the basis of jurisdiction" be considered by this Court as a petition for a writ of certiorari, the claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.**

### A.

*The proceedings before the notary and the commitment of appellant did not deny him due process of law.*

The constitutionality of the statutory scheme provided by Sections 11510, 11511 and 11512 with respect to the requirements of notice and opportunity for hearing has already been shown, *supra*, at page 12. The action of the notary was in strict conformance to those sections and satisfied every requirement of due process of law. The appellant suggests that neither he nor his counsel received notice or were given an opportunity to be heard before the notary issued the writ of attachment and apparently complains because the notary did not first hold a hearing to determine whether appellant's disobedience of the subpœna shown to be personally served upon him constituted contempt, before the notary initiated, by issuance of the writ of attachment, the proceedings looking to such a hearing and to such a determination. (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, p. 8.) The issuance of the writ of attachment initiated the proceeding for a hearing. The appellant refused such hearing and prevented it by untimely

resort to the courts. He can base no rights on the absence of a hearing he thus prevented and refused to have. The contention that a writ or warrant of arrest may not be signed or issued except upon additional notice to and in the voluntary presence of the person sought to be arrested is manifestly absurd.

Furthermore, in the instant case the appellant has had the benefit of a full, free and untrammelled review, pursuant to the provisions of Section 11514, by one of the State Courts of Appeals of Ohio and by the Supreme Court of Ohio and both courts have found that the examining officer proceeded in strict compliance with the law. Were such review essential, as it is not, it would properly be considered in determining the adequacy of the due process provided by the State. *Frank* v. *Mangum*, 237 U. S. 309, 327.

B.

*The suggestion that the record discloses a disqualifying pecuniary interest of the notary is without basis in fact or law; but were such disqualifying interest assumed to exist, the record would establish both that it was waived by the appellant and cured by the subsequent review.*

The notary had no disqualifying interest in fact. It was so found by the Supreme Court of Ohio. (R. 80, 91.) He is an official of the State, appointed for the express purpose of presiding at the taking of depositions, and it can no more be said that he is in the employ of the party calling upon him than that a judge to whom is submitted an application for a writ of

*habeas corpus* or a motion for a restraining order is in the employ of the applicant therefor. The appellant, through his counsel, ordered copies of the transcription (R. 160) and thus the "employment," if any, was mutual.

Moreover, this witness never appeared in response to the subpœna, and it is unknown whether, had he testified, his testimony would have been taken down by the notary or some other disinterested person under Section 11537 of the Ohio General Code. However, on the assumption that under the usual practice the testimony would have been taken down, in the absence of objection, by the notary, there would be no disqualification in fact. In such circumstances, the notary would be compensated in any event for the services actually performed; and his compensation for such services would be no greater and no less whether or not he commits the witness. The suggestion that the length or extent of his services might be affected is fanciful and sustained by no authority. This contention was first raised by appellant in his Amended Application to the State Court of Appeals (R. 107-109, 160). Counsel appeared on behalf of the appellant before the notary at the taking of the depositions when appellant refused to appear in response to his subpœna. Hence, if the disqualification had in fact existed, it would be waived by failure of appellant's counsel to object. *State ex rel. Bowman* v. *Commissioners*, 124 O. S. 174; *Tari* v. *State*, 117 O. S. 481. But if a disqualification were assumed to exist and not to have been waived, it would not have deprived the

notary of jurisdiction; and the subsequent hearing on the merits by a disinterested court under Section 11514 sought and obtained by the appellant, would have cured any such supposed defect and satisfied every requirement of due process of law. *Ex parte Meeks*, 20 Fed. (2d) 543; *Tari* v. *State*, 117 O. S. 481; *Hill* v. *State*, 174 Ark. 886, 298 S. W. 321; *Hitt* v. *State*, 149 Miss. 718, 115 So. 879; *Ex parte Lewis*, 288 Pac. 354 (Okla. 1930); *Brooks* v. *Town of Potomac*, 149 Va. 427, 141 S. E. 249.

C.

*The contention that the subpœna duces tecum, as an unreasonable search and seizure, violated the fourteenth Amendment, is clearly untenable.*

The subpœna *duces tecum* as found by the Supreme Court of Ohio (R. 80, 90.) does not constitute an unreasonable search and seizure in view of the broad scope and ramifications of the fraudulent conspiracy and the fraudulent misrepresentations set forth in the petition in the Common Pleas Court. The same view was taken by the State Court of Appeals (R. 198). However, even if the contrary be assumed for the sake of argument, it is clear that no Federal question is thereby presented. The personal rights, privileges and immunities set forth in the first eight Amendments of the Federal Constitution, including the safeguard against unreasonable searches and seizures provided in the Fourth Amendment, are not within the "privileges and immunities" covered by the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U. S.

78, 98, 99. And therefore an unreasonable search and seizure may be made by a State officer under State authority without violating the Federal Constitution. *Weeks* v. *United States*, 232 U. S. 383.

We respectfully submit that the record presents no substantial Federal question which would warrant this Court in taking jurisdiction and that the appeal has been taken for delay to frustrate the exercise of valuable rights by the Common Pleas plaintiff. Any further delay subjects the Common Pleas plaintiff to the hazard if not probably to the loss of essential evidence. Under these circumstances justice as well as law requires a prompt refusal of jurisdiction.

Respectfully submitted,

NEWTON D. BAKER,
HAROLD W. FRASER,
RAYMOND T. JACKSON,
JOHN C. MORLEY,
*Counsel for Appellee.*

## APPENDIX A.

### Sections of the General Code of Ohio Involved, Cited or Discussed.

"Sec. 11497. *Corporations; officers may be examined.*—At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by a counter testimony" (R. S., Sec. 5243).

"Sec. 11502. *Subpœna on taking depositions.*—When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer" (R. S., Sec. 5248).

"Sec. 11503. *What subpœna to contain.*—A subpœna shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence" (R. S., Sec. 5247).

"Sec. 11504. *Service of subpœna.*—A subpœna may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed" (R. S., Sec. 5246).

"Sec. 11510. *Contempt of court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition,

may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required" (R. S., Sec. 5252).

"SEC. 11511. *When attachment may issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him" (R. S., Sec. 5253).

"SEC. 11512. *Punishment for contempt.*—Punishment for the acts of contempt specified in Section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition" (R. S., Sec. 5254).

"SEC. 11514. *How witness released from imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal" (R. S., Sec. 5255).

"SEC. 11521. *How testimony taken.*—The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination" (R. S., Sec. 5261).

"SEC. 11525. *When deposition may be used.*—The deposition of a witness may be used only when it is made to appear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of the witness is not required" (R. S., Secs. 5265, 5281).

"SEC. 11526. *What deposition taken.*—Either party may commence taking testimony by deposition at any time after service upon the defendant" (R. S., Sec. 5266).

"SEC. 11529. *Officers authorized to take depositions.*—Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission" (R. S., Sec. 5269).

"SEC. 11534. *Notice to take deposition.*—Written notice of the intention to take a deposition shall be given to the adverse party, except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time when and place where it will be taken. In

case the deposition of a party to the suit be taken, it shall not be used in his own behalf, unless the notice specified that his deposition would be taken" (R. S., Sec. 5273).

"SEC. 11535. *Service of notice.*—Such notice must be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent. The deposition shall only be used against such parties as are served with notice in one of the modes prescribed. It also must be served so as to allow the adverse party time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice. If so stated in the notice, the examination may be adjourned from day to day" (R. S., Sec. 5273).

"SEC. 11537. *By whom deposition written.*—The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness" (R. S., Sec. 5275).

"SEC. 12165. *When writ not allowed.*—If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate *had jurisdiction to issue the process,* render the judgment, *or make the order, the writ shall not be allowed;* or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order" (R. S., Sec. 5729). (Italics ours.)

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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

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# No. 786

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ROBERT A. STRANAHAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

---

**STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED BY THE PLAINTIFF IN ERROR (APPELLANT) THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF OHIO, AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.**

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Pursuant to paragraph 1, Rule 12, of the Supreme Court of the United States, plaintiff in error, Robert

A. Stranahan (Appellant), presents and files this, his statement particularly disclosing the basis upon which it is contended by him that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Ohio desired to be appealed from:

A.

**Statutory Provision Sustaining Jurisdiction.**

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on appeal is the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 937; Jud. Code, Sec. 237; 28 U. S. C. A., Sec. 344) which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to th Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

* * * * * * *

as modified by the act of January 31, 1928, c. 14, Secs. 1 and 2 (45 Stat. 54), as amended April 26, 1928, c. 440,

45 Stat. 466 (28 U. S. C. A., Sec. 861*a* and 861*b*), which respectively provide:

> SEC. 861*a*. "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."
>
> SEC. 861*b*. "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

**Statutes of the State of Ohio the Validity of Which is Involved.**

The statutes of the State of Ohio, the validity of which is involved, are Ohio General Code Sections 11497, 11510, 11511, 11512, and 11514, Vol. 3, The General Code of Ohio, 1910, pages 2465 to 2468, inclusive (Page's Annotated Ohio General Code, Vol. 2, pages 4732, 4736 to 4738; The Complete Ohio General Code, Page's Desk Ed., 932, pages 2528, 2529; Throckmorton's Annotated Code of Ohio, 1929, pages 2890 to 2893). These sections provide as follows:

> "SEC. 11497. *Corporations; Officers May Be Examined.*—At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a

corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony" (101 v. 139).

SEC. 11510. *Contempt of Court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required" (51 v. 57, Sec. 322).

SEC. 11511. *When Attachment May Issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him" (51 v. 57, Sec. 323).

"SEC. 11512. *Punishment for Contempt.*—Punishment for the acts of contempt specified in section eleven thousand five hundred and ten

shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition" (77 v. 42, 45).

"SEC. 11514. *How Witness Released from Imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal" (103 v. 405, 426).

C.

**Date of Judgment Sought to be Reviewed and Date of Presentation of Application for Appeal.**

The judgment of the Supreme Court of Ohio desired to be appealed from was entered on the 25th day of January, 1933, and the application for appeal is presented and filed this 10th day of February, 1933.

D.

**Nature of Case and Rulings of the Supreme Court of Ohio.**

This is a suit involving questions under the Federal Constitution as to the right of a State to empower notaries public to imprison witnesses without judicial hearing or sanction. The action was begun in the Court of Appeals of Lucas County, Ohio, by plaintiff in error, Robert A. Stranahan, as petitioner, against

the sheriff of Lucas County, Ohio, as respondent, to obtain petitioner's discharge from the custody of said sheriff. Petitioner had been arrested and attached to answer to a notary public for contempt in failing to appear to give his testimony in the course of taking depositions for use in a civil action pending in the Court of Common Pleas of Lucas County, Ohio.

Petitioner was granted a writ of *habeas corpus* by the Court of Appeals for Lucas County, Ohio, which released petitioner on bail. On final hearing that court discharged the writ and remanded petitioner to the custody of the sheriff. Proceedings in error were filed and heard in the Supreme Court of Ohio, which affirmed the lower court, holding as hereinafter set forth.

In ordering the arrest and attachment of the petitioner the notary public purported to act under the Ohio General Code Sections 11497, 11510, 11511 and 11512, inclusive, above quoted.

Under these sections as construed by the Supreme Court of Ohio, the notary *should* require a witness to answer only questions and produce only documentary evidence which are "pertinent to the issues tendered or made" and "in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceedings in chancery," *Ex Parte Jennings*, 60 O. S. 319 (1899); *Ex Parte Schoepf*, 74 O. S. 1 (1906) (syllabus). But the notary, who is a mere "ministerial" or executive officer, has the *power* to order the imprisonment of a witness for refusal to answer incompetent, irrelevant or immaterial questions and for the refusal

to produce wholly incompetent, irrelevant or immaterial documentary evidence. The witness may disobey such order only at his peril. *The notary public is not vested with power or jurisdiction to hear and determine any questions as to the competency, relevancy or materiality of any evidence,* and may, *without determining any of these questions,* order a witness to be committed to jail until he answers. No oportunity is afforded by the Ohio statutes for judicial review of any such order *prior* to imprisonment. *De Camp* v. *Archibald,* 50 O. S. 618 (1893); *Ex Parte Jennings,* 60 O. S. 319 (1899); *In re Rauh,* 65 O. S. 128 (1901); *Ex Parte Schoepf,* 74 O. S. 1 (1906). See also the opinion of the court in the instant case.

It thus appears that the question as to whether petitioner should be imprisoned is by the laws of Ohio left to the uncontrolled will of a ministerial or executive officer, who has neither power nor authority to determine what would be a proper exercise of his statutory power and whose decision to imprison or not to imprison depends upon nothing but his mere will.

The record in the instant case shows that when the petitioner was ordered to be taken into the custody of the respondent to answer to the notary public for his alleged contempt, the notary public did not hold any hearing, hear any arguments, or give the petitioner or his counsel any notice or opportunity to be heard, but that *in the absence of petitioner and his counsel* the notary signed and issued the order of attachment, which had been prepared and was presented to him by counsel for the party seeking to take the deposition.

It further appears that the particular notary public in the case at bar would have been disqualified to adjudicate, if he had authority so to do, by reason of the fact that he was selected and employed by, and the continuance of his employment was at the will of, the party seeking to take the deposition, and the amount of his compensation was directly dependent upon the length of the deposition and the number of writings to be copied therein.

Petitioner maintained, and now maintains, that the above sections of the Ohio Statutes and the operation thereof under the facts of this case are unconstitutional and void, and that he has been by the authority of the State of Ohio deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

There is further involved in this case the question whether the purported subpœna *duces tecum* issued by the notary and served upon the petitioner was illegal and void and constituted an unreasonable search and seizure in violation of the Fourteenth Amendment to the Constitution of the United States.

In determining the questions presented the rulings of the Supreme Court of Ohio, as expressed in the syllabus of the court, which under Rule VI of the Supreme Court of Ohio states the points of law decided, were as follows:

> "1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

"2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. *De Camp* v. *Archibald*, 50 Ohio St. 618, and *Benckenstein* v. *Schott*, 92 Ohio St. 29, approved and followed.

"3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

"6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of *Tumey* v. *Ohio*, 273 U. S. 510, has no application whatever.

"7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide and subpœnas *duces tecum*, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures."

E.

**Cases Believed to Sustain Jurisdiction.**

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction on appeal of the Supreme Court of the United States:

*Weston et al.* v. *The City Council of Charleston*, 2 Pet. 449, 464 (1829).

*Tinsley* v. *Anderson*, 171 U. S. 101, 105 (1898).

*Bryant* v. *Zimmerman*, 278 U. S. 63, 70 (1928).

*Tumey* v. *Ohio*, 273 U. S. 510 (1927).

In addition, attention is invited to the memorandum opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *In the Matter of C. N. Bevan, on Habeas Corpus*, in which the court said—

> "If the Supreme Court of Ohio should decide the case (the instant case) presented to it adversely to appellant's contention, it is open to them to seek a review of its decisions by the Supreme Court of the United States."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

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# No. 786

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ROBERT A. STRANAHAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

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## APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

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NEWTON D. BAKER,
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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

# No. 786

ROBERT A. STRANAHAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

## APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

### Nature of the Case.

This is an appeal from a final judgment of the Supreme Court of Ohio, which held that the appellant had been lawfully attached to answer for an alleged contempt. The appellant who had been personally served with a subpœna to appear before a notary public and give his testimony in a civil suit pending in the Common Pleas Court of Lucas County, Ohio, was attached for his disregard of and refusal to appear, *while making no claim of privilege,* in response to such

subpœna. The writ of attachment, issued by the notary pursuant to Section 11511 Ohio General Code, commanded the sheriff to attach the appellant and bring him before the Notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action" (R. 102-103).* The appellant, as hereinafter appears, prevented the sheriff from bringing him before the examining officer for hearing as to whether his disobedience of the subpœna constituted contempt by precipitate and untimely resort to the courts.

The testimony of the appellant was sought to be taken before a Notary Public, under the following statutory scheme of the State of Ohio for taking testimony by deposition in civil cases. For the convenience of the Court the pertinent sections of the Ohio General Code are printed in full in Appendix A hereof.

Section 11521** provides that the testimony of witnesses may be taken in any civil proceeding by deposition or oral examination. Section 11526 provides that "either party may commence taking *testimony* by deposition at any time after service upon the defendant." Section 11534 requires that notice of the taking of the deposition be given to the adverse party. Section 11535 prescribes the manner of notice and provides that the deposition shall only be used against such

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* All references to the Record are to pages of the transcript in manuscript form.

** All statuory references throughout this Statement, unless otherwise indicated, are to Sections of the Ohio General Code.

parties as shall have been given such notice. Section 11525 provides that such deposition shall not be used at the time of trial unless the witness is then absent, dead or infirm, or where the oral examination of the witness is not required. Section 11529 enumerates the officers authorized to take depositions and includes, among others, notary publics and judges. Sections 11502, 11503 and 11504 provide for the issuance, form and service of subpœnas and subpœnas *duces tecum*. This in brief and so far as deemed material is the legislative scheme for the taking of testimony by deposition in civil cases in Ohio.

Sections 11510, 11511 and 11512 provide for the enforcement of this method of taking testimony in civil cases in Ohio. In passing it may be noted that these sections also cover the compulsion of oral testimony in open court. Section 11510 defines contempt as (1) disobedience of a subpœna; (2) refusal to be sworn; and (3) unlawful refusal to answer as a witness. The Section also provides that any such disobedience "may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." The last two species of contempt are necessarily committed in the presence of the examining magistrate and the statute authorizes their punishment without further citation or hearing. The contempt defined as disobedience of a subpœna is not committed in the presence of the examining magistrate; and Section 11511 provides that if the witness has been *personally served*, the examining magistrate may issue an attachemnt to bring the intended witness before the

magistrate to answer for his contempt as well as to give testimony, but provides that in the absence of personal service, the magistrate must proceed by rule to show cause against the defaulting witness. Section 11512 provides as punishment that the recalcitrant witness may be imprisoned "until he submits to be sworn, testifies or gives his deposition."

The statutory scheme of the State for taking testimony by deposition is completed by Section 11514 of the Ohio General Code, which provides that a witness committed for contempt for refusal to appear, to be sworn or to testify may immediately apply to any one of the Judges of any of the courts of record of the State who may discharge the witness "if it appears that his imprisonment is *illegal*." Section 11514 thus provides a judicial review of the legality of a commitment or an attachment of a witness. *DeCamp* v. *Archibald*, 50 O. S. 618 at 626 (Section 11514 of the Ohio General Code was formerly Section 5255 of the Revised Statutes of Ohio); *Beuckenstein* v. *Schott*, 92 O. S. 29 at 41. This judicial review is not a mere remedy by *habeas corpus*. Under the Ohio statutes, as at common law, the remedy of *habeas corpus* is limited to testing the *jurisdiction* of the committing authority (Section 12165). On the other hand, an application for release from imprisonment under Section 11514 tests not merly the jurisdiction of the committing magistrate but provides a full and free examination of the *legality* of the restraint without prejudice by reason of any action, finding or conclusion of the commiting magistrate. It was under these statutes and this statutory scheme that the plaintiff in the Common

Pleas suit sought to take the testimony of the Appellant Stranahan.*

Immediately following appellant's technical arrest on the attachment issued by the notary (R. 84), and before the sheriff had an opportunity to bring him before the notary for hearing to answer for his contempt, he applied to the Court of Appeals of Lucas County, Ohio, for his release from imprisonment, as authorized by Ohio General Code, Sec. 11514 (R. 99-101). After

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* While the absence of a similar procedure in other States would furnish no ground for criticism of the statutory scheme for the administration of justice in Ohio, it is interesting and significant to note that the statutory scheme of Ohio for the compulsion of testimony by deposition or otherwise is identical with, substantially the same, or very similar to the corresponding statutory procedure of many other States.

Statutes in the following States are identical with Ohio General Code, Sections 11510, 11511, 11512 and 11514:

*Kansas*—Revised Statutes of Kansas, 1923, Chapter 60, Sections 2812, 2813, 2814, 2815, 2823.

*Nebraska*—Compiled Statutes of Nebraska, 1929, Chapter 20, Sections 1229, 1230, 1231, Chapter 60, Section 107 (No section to correspond with O. G. C., Sec. 11514).

*Oklahoma*—Oklahoma Statutes, 1931, Sections 278, 279, 280, 281, 296.

*South Dakota*—Compiled Laws of South Dakota, 1929, Sections 2740, 2741, 2742, 2743, 2758.

*Wyoming*—Wyoming Revised Statutes, 1931, Chapter 89, Sections 1715, 1716, 1717, 1718, 1805.

In the following States the corresponding statutes

a full and complete review of the notary's action the Court of Appeals denied his release (R. 96, 194-198). To this judgment a writ of error was obtained from the Ohio Supreme Court and from the decision of that court affirming the Court of Appeals (R. 79-82) the appellant now prosecutes this appeal to the Supreme Court of the United States.

During the interim between the judgment of the Lucas County Court of Appeals and the decision by

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are substantially to the same effect as Ohio General Code, Sections 11510, 11511 and 11512:

*Nevada*—Nevada Compiled Laws, 1929, Sections 8985, 8987, 8988, 9002.

*Oregon*—Oregon Code Annotated, 1930, Sections 9-1109, 9-1111, 9-1112, 9-1701, 9-2201.

*Utah*—Compiled Laws of Utah, 1917, Sections 7133, 7135, 7136, 4253.

The following States have adopted similar statutory schemes which permit notaries or other non-judicial officers authorized to take depositions variously to summarily issue attachments or commit witnesses who disobey subpœnas or refuse to testify:

*Arizona*—Revised Code of Arizona, 1928, Sections 4419, 4426, 4427.

*Arkansas*—Digest and Statutes of Arkansas, 1921, Sections 4211, 4231, 4232.

*Connecticut*—General Statutes of Connecticut, Revision of 1930, Section 5589.

*Florida*—Compiled General Laws of Florida, 1927, Sections 4438, 4439.

*Iowa*—Code of Iowa, 1931, Sections 11341, 11358, 11359 and 12540 to 12551, inclusive.

the Ohio Supreme Court, the appellant attempted the collateral remedy of *habeas corpus* in the Federal courts. That collateral proceeding has already reached this Court and was disposed of on December 12, 1932. *Stranahan* v. *Light*, October Term, 1932, No. 502, certiorari denied. For a detailed description of the numerous steps taken by the appellant to avoid and delay as long as possible his duty to testify, we respectfully refer the Court to respondent's brief in opposition to petition for certiorari, pp. 5-9, *Stranahan* v. *Light*, October Term, 1932, No. 502.

The petition in the common pleas court charges the defendants with a far-flung fraudulent conspiracy (R. 108-129). It is evident both from the objections first

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*Louisiana*—Marr's Revised Code of Practice of Louisiana, 1927. R. S. 615, page 361, and R. S. 618, page 362.

*Maine*—Revised Statutes of Maine, 1930, Chapter 121, Sections 2 and 29.

*Michigan*—Compiled Laws of Michigan, 1929, Sections 14,228, 14,229, 14,230.

*Mississippi*—Mississippi Code, 1930, Section 1535.

*Missouri*—Revised Statutes of Missouri, 1929, Sections 1756 and 1773.

*New Hampshire*—Public Laws of New Hampshire, 1926, Chapter 336, Sections 4 and 7.

*Texas*—Vernon's Annotated Texas Statutes, Title 55, Articles 3707, 3709, 3746, 3747, 3748.

*Vermont*—General Laws of Vermont, 1917, Sections 1911, 1919, 1920, 1921.

*West Virginia*—Official Code of West Virginia, 1931, Chapter 57, Article 4, Section 1; Chapter 57, Article 5, Sections 5 and 6.

raised by counsel for the appellant at the commencement of the depositions and from the subsequent course followed by appellant that the real reason why appellant is now before this Court is not to procure his release from an imprisonment which he has never suffered, but to prevent a hearing before the proper officer and an adjudication as to the contempt charged and to continue, with all the means at his command, his effort to obstruct and delay the taking of depositions in the Common Pleas Court and the orderly administration of justice in the courts of Ohio. In short, the real question here is not whether the appellant shall be imprisoned, but whether the appellant may avoid a hearing on the contempt charged and, if found guilty of such contempt, may be compelled to give his testimony in the State courts in accordance with the procedure provided by the State for the administration of justice. The Supreme Court of Ohio has squarely decided that the plaintiff in the Common Pleas Court is entitled, as a matter of law, justice and right, to the testimony of the appellant and other defendants prosecuting sister appeals to this Court. Nevertheless, the appellant now seeks further delays by raising sham and frivolous constitutional questions in a final attempt to obtain a review in this Court.

We respectfully submit that this Court should decline jurisdiction of this appeal upon the following grounds:

I. The claims of an unconstitutional exercise of authority under the Ohio statutes sustained below are not a basis of jurisdiction on appeal.

II. The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.

And in the event appellant's statement is treated as a petition for certiorari, we respectfully submit that:

III. The claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.

## REASONS AND AUTHORITIES MAKING AGAINST JURISDICTION.

### I.

**The jurisdiction of this Court to entertain this appeal is based exclusively on the holding of the Ohio Supreme Court that Sections 11510, 11511, 11512 and 11514 of the Ohio General Code are not in violation of the Federal Constitution; and the claims, were they meritorious, of an unconstitutional exercise of authority under these statutes are not a basis of jurisdiction on appeal.**

Inasmuch as there is no question involved in this case of the validity of any statute or treaty of the United States, the sole ground which can be asserted by the appellant to sustain the jurisdiction of this Court is the alleged repugnancy to the Federal Constitution of such statutes of Ohio as may have been sustained by the court below. The other claims of the appellant, assuming they could be considered as raising substantial Federal questions, do not as a matter of

right entitle the appellant to an appeal, but may only be addressed to the discretion of the Court on a petition for a writ of certiorari. *Judicial Code*, Sec. 237, 28 U. S. C. A. 344; *Zucht* v. *King*, 260 U. S. 174, 177. Therefore the following contentions, irrespective of their lack of substance, are improperly asserted as a basis of jurisdiction: (*a*) That appellant was deprived by the notary of notice and an opportunity to be heard; (*b*) that the notary was in fact disqualified on account of personal interest; (*c*) that the appellant was served with a *subpœna duces tecum* which constituted an unreasonable search and seizure (the subpœna served on appellant contained no *duces tecum* clause* (R. 104)).

The appellant also apparently asserts that Sections 11497 and 11503 are unconstitutional as in violation of the Fourteenth Amendment. (Appellant's statement in support of jurisdiction, Section B, p. 3.) While the contention is clearly without merit, it is, if advanced, being made for the first time in appellant's petition for, and assignment of errors on, this appeal. Since the claim was neither raised nor passed upon in the State courts, clearly it can furnish no basis of jurisdiction here. *Hulbert* v. *Chicago*, 202 U. S. 275, 280.

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*The subpœna served upon the appellant, Stranahan, in this respect differs from the subpœnas in the companion cases of *Ex parte Bevans* and *Ex parte Koehrman*. The inclusion of this claim in appellant's statement was no doubt an unintentional error on the part of counsel.

II.

**The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.**

To give the Supreme Court of the United States jurisdiction to review the judgment of a State court, the bare averment of a Federal question is not sufficient and if it appears that the claim of unconstitutionality is insubstantial, frivolous or fictitious, or that the appeal is prosecuted solely for delay, this Court will refuse to entertain jurisdiction, although a Federal question may in form be presented in the record. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Wilson v. North Carolina*, 169 U. S. 586, 595; *Sawyer* v. *Piper*, 189 U. S. 154, 156; *Patterson* v. *Colorado*, 205 U. S. 454; *Parker* v. *McLain*, 237 U. S. 469, 471; *Union Pacific Railroad Co.* v. *Laughlin*, 247 U. S. 204; *Zucht* v. *King*, 260 U. S. 174, 177.

The power of the State of Ohio to require its citizens to give testimony in advance of trial in civil actions pending in its courts is not disputed by the appellant. It is only the machinery set up by the State for the carrying out of that power that is objected to. Granted the basic power of the State to enforce the duty of its citizens to testify in aid of the administration of civil justice, the particular mechanics adopted by the legislature eighty years ago (Act of March 11,

1853, Ohio Laws, Chap. 1202, Sections 322-325) for the enforcement and administration of that basic power is a matter exclusively of internal interest and control. It should, therefore, require a case of clearly unreasonable procedural provisions to warrant the assumption of jurisdiction by the Supreme Court of the United States. *Twining* v. *New Jersey,* 211 U. S. 78, where it was stated at page 114:

> "* * * The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

A.

*The contention that Sections 11510, 11511 and 11512, according to their terms, fail to provide for notice and an opportunity to be heard in violation of the Fourteenth Amendment is without substance or merit.*

From the analysis of Sections 11510, 11511 and 11512 heretofore made (pages 3-4, *supra*), it is clear that such statutes provide that on failure of the witness to obey a subpœna personally served, the examining officer may issue an attachment commanding the sheriff to bring the recalcitrant witness before him to answer for the contempt. This is in strict accordance with every requirement of due process of law. It is well settled that where an intended witness fails to

appear in obedience to process shown by the officer's return to have been personally served, proceedings to punish for contempt may be initiated by issuance of attachment without further showing. *McGrain* v. *Daugherty,* 273 U. S. 135, 157; *Wilson* v. *State,* 57 Ind. 71, 73; *In re Steiner,* 195 Fed. 299, 302. The issuance of such an attachment and the arrest thereunder is not as a punishment for contempt, but for the purpose of initiating the proceedings and bringing the person before the court or magistrate to answer for the alleged contempt. Such process affords both notice and opportunity to be heard. There can be no question, therefore, but that the above sections, so far as they apply to the attachment of the appellant, are constitutional according to their terms.

B.

*The contention that the power to enforce testimony, as conferred by Sections 11510, 11511 and 11512 upon non-judicial officers, is repugnant to the Fourteenth Amendment, is an attempt to reopen a question settled beyond dispute and is wholly without foundation.*

The further contention of the appellant that the notary, being a non-judicial officer, is without power to issue an attachment for the purpose of enforcing the attendance of a witness and initiating a contempt proceeding and that therefore the statutes violate the due process clause, is merely the old argument, somewhat refurbished, that a State may not delegate its enforcement powers to non-judicial officers and that due process requires judicial process. That such an

argument is no longer tenable is beyond dispute. *Carfer, Sheriff*, v. *Caldwell*, 200 U. S. 293, 297; *Reetz* v. *Michigan*, 188 U. S. 505, 507; *Dreyer* v. *Illinois*, 187 U. S. 71, 84.

However, this appellant, who refused to appear in response to his subpœna and to whom, therefore, no questions were put, can raise no question whether the exercise by a notary of the power to determine whether questions put to a witness are lawful and to commit for contempt for refusal to answer lawful questions, denies due process under the Federal Constitution. However, were such a question properly raised by the appellant, as it is not, it would clearly be without merit.

The bald and unsupported statement of appellant that the question as to whether the witness should be imprisoned is left to the uncontrolled will of the notary (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, page 7) is in the teeth of the express wording of Sections 11510, 11512 which limits the examining officer's power and jurisdiction to commitments as specifically defined in the statutes. Thus there is no question here of the conferring of an arbitrary, despotic or unlimited power upon an officer of the State. The possibility that either a court or officer may err has never been held to make it unconstitutional to vest either with power. Nor do the Ohio decisions support the claim that a notary is without power to determine whether a contempt, as defined by the statute, has been committed. The fact is that the examining magistrate, whether a

notary public or a judge (and he may be either under Section 11529), does not have power to pass upon whether the evidence taken on the deposition shall be admissible as between the parties to the action on the trial of the cause, that determination being reserved for the judge presiding over the trial. However, the examining magistrate, whether a notary public or a judge, does have the power to determine whether the witness has committed a contempt and to enforce the giving of his testimony on the deposition. *DeCamp* v. *Archibald*, 50 O. S. 618, 625; *Ex parte Jennings*, 60 O. S. 319, 328; *Ex parte Woodworth*, 6 Ohio Decisions 19, 21; 14 Ohio Jurisprudence 38; *Benckenstein* v. *Scott*, 92 O. S. 29. This is a familiar rule in Federal practice. *Nelson* v. *United States*, 201 U. S. 92, 114; *Dowagiac Mfg. Co.* v. *Lochren* (8 C. C. A.), 143 Fed. 211, 215.

C.

*While the full, free and untrammeled judicial review provided by Section 11514 is not necessary to afford due process, it is clear that the provisions of such right of review can not violate the Fourteenth Amendment, as appears to be alleged by appellant's statement in support of jurisdiction, but that it merely further evidences the care of the State to safeguard every legitimate right of a witness.*

The appellant includes Section 11514 as one of the statutes claimed to be unconstitutional (Appellant's Statement in Support of Jurisdiction, Sec. B, p. 3). It is settled that a right of appeal or review is not an

essential element of due process. *Reetz* v. *Michigan*, 188 U. S. 505, 508. We have already seen that jurisdiction and power to attach and punish for contempts, as defined in the statute, have been lawfully conferred upon a notary public. The provision for a review not merely of his jurisdiction but of the legality of his action was not essential to due process, but it does demonstrate the care with which the State has safeguarded every legitimate right of a witness. The appellant objects that this review does not precede his attachment to answer for the contempt charged (Appellant's Statement in Support of Jurisdiction, Sec. D, p. 7). We know of no principle that when power is lawfully conferred upon any officer, it may not be exercised until his proposed action has first been reviewed by a court. The appellant's contention here is not merely that an officer authorized to compel attendance and testimony may not issue a writ of attachment to initiate contempt proceedings for disobedience of a subpœna shown to have been personally served without a preliminary hearing voluntarily attended by the recalcitrant witness (shown to be wholly without merit at page 12, *supra*), but that such an officer under such circumstances may not issue a writ of attachment to initiate such contempt proceedings without a previous adjudication by a court. The mere statement of the contention refutes it.

However, the existence of this full, free and untrammelled review by application to any court of record in the State of Ohio does emphasize the reasonableness of the statutory scheme of Ohio for taking testi-

mony by deposition in civil causes and does furnish a prompt and efficacious remedy for any error of the examining officer.

## III.

**If appellant's "statement disclosing the basis of jurisdiction" be considered by this Court as a petition for a writ of certiorari, the claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.**

### A.

*The proceedings before the notary and the commitment of appellant did not deny him due process of law.*

The constitutionality of the statutory scheme provided by Sections 11510, 11511 and 11512 with respect to the requirements of notice and opportunity for hearing has already been shown *supra* at page 12. The action of the notary was in strict conformance to those sections and satisfied every requirement of due process of law. The appellant suggests that neither he nor his counsel received notice or were given an opportunity to be heard before the notary issued the writ of attachment and apparently complains because the notary did not first hold a hearing to determine whether appellant's disobedience of the subpœna shown to be personally served upon him constituted contempt, before the notary initiated, by issuance of the writ of attachment, the proceedings looking to such a hearing and to such a determination. (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, p. 7.)

The issuance of the writ of attachment initiated the proceeding for a hearing. The appellant refused such hearing and prevented it by untimely resort to the courts. He can base no rights on the absence of a hearing he thus prevented and refused to have. The contention that a writ or warrant of arrest may not be signed or issued except upon additional notice to and in the voluntary presence of the person sought to be arrested is manifestly absurd.

Furthermore, in the instant case the appellant has had the benefit of a full, free and untrammelled review, pursuant to the provisions of Section 11514, by one of the State Courts of Appeals of Ohio and by the Supreme Court of Ohio and both courts have found that the examining officer proceeded in strict compliance with the law. Were such review essential, as it is not, it would properly be considered in determining the adequacy of the due process provided by the State. *Frank* v. *Mangum*, 237 U. S. 309, 327.

B.

*The suggestion that the record discloses a disqualifying pecuniary interest of the notary is without basis in fact or law; but were such disqualifying interest assumed to exist, the record would establish both that it was waived by the appellant and cured by the subsequent review.*

The notary had no disqualifying interest in fact. It was so found by the Supreme Court of Ohio. (R. 80, 91.) He is an official of the State, appointed for the express purpose of presiding at the taking of deposi-

tions, and it can no more be said that he is in the employ of the party calling upon him than that a judge to whom is submitted an application for a writ of habeas corpus or a motion for a restraining order is in the employ of the applicant therefor. The appellant, through his counsel, ordered copies of the transcription (R. 158) and thus the "employment", if any was mutual.

Moreover, this witness never appeared in response to the subpœna, and it is unknown whether, had he testified, his testimony would have been taken down by the notary or some other disinterested person under Section 11537 of the Ohio General Code. However, on the assumption that under the usual practice the testimony would have been taken down, in the absence of objection, by the notary, there would be no disqualification in fact. In such circumstances, the notary would be compensated in any event for the services actually performed; and his compensation for such services would be no greater and no less whether or not he commits the witness. The suggestion that the length or extent of his services might be affected is fanciful and sustained by no authority. This contention was first raised by appellant in his Amended Application to the State Court of Appeals (R. 105-107, 158). Counsel appeared on behalf of the appellant before the notary at the taking of the depositions when appellant refused to appear in response to his subpœna. Hence, if the disqualification had in fact existed, it would be waived by failure of appellant's counsel to object. *State ex rel. Bowman* v. *Commis-*

*sioners*, 124 O. S. 174; *Tari* v. *State*, 117 O. S. 481. But if a disqualification were assumed to exist and not to have been waived, it would not have deprived the notary of jurisdiction; and the subsequent hearing on the merits by a disinterested court under Section 11514 sought and obtained by the appellant, would have cured any such supposed defect and satisfied every requirement of due process of law. *Ex parte Meeks*, 20 Fed. (2d) 543; *Tari* v. *State*, 117 O. S. 481; *Hill* v. *State*, 174 Ark. 886, 298 S. W. 321; *Hitt* v. *State*, 149 Miss. 718, 115 So. 879; *Ex parte Lewis*, 288 Pac. 354, (Okla. 1930); *Brooks* v. *Town of Potomac*, 149 Va. 427, 141 S. E. 249.

We respectfully submit that the record presents no substantial Federal question which would warrant this Court in taking jurisdiction and that the appeal has been taken for delay to frustrate the exercise of valuable rights by the Common Pleas plaintiff. Any further delay subjects the Common Pleas plaintiff to the hazard if not probably to the loss of essential evidence. Under these circumstances justice as well as law requires a prompt refusal of jurisdiction.

Respectfully submitted,

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RAYMOND T. JACKSON,
JOHN C. MORLEY,
*Counsel for Appellee.*

## APPENDIX A.

### Sections of the General Code of Ohio Involved, Cited or Discussed.

"SEC. 11497. *Corporations; officers may be examined.*—At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony" (R. S., Sec. 5243).

"SEC. 11502. *Subpœna on taking depositions.*—When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer" (R. S., Sec. 5248).

"Sec. 11503. *What subpœna to contain.*—A subpœna shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence" (R. S., Sec. 5247).

"SEC. 11504. *Service of subpœna.*—A subpœna may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed" (R. S., Sec. 5246).

"SEC. 11510. *Contempt of court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal

to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required" (R. S., Sec. 5252).

"SEC. 11511. *When attachment may issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him" (R. S., 5253).

"SEC. 11512. *Punishment for contempt.*—Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition" (R. S., Sec. 5254).

"SEC. 11514. *How witness released from imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge

him, if it appears that his imprisonment is illegal" (R. S., Sec. 5255).

"Sec. 11521. *How testimony taken.*—The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination" (R. S., Sec. 5261).

"Sec. 11525. *When deposition may be used.*—The deposition of a witness may be used only when it is made to appear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of the witness is not required" (R. S., Secs. 5265, 5281).

"Sec. 11526. *What deposition taken.*—Either party may commence taking testimony by deposition at any time after service upon the defendant" (R. S., Sec. 5266).

"Sec. 11529. *Officers authorized to take depositions.*—Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or the clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission" (R. S., Sec. 5269).

"Sec. 11534. *Notice to take deposition.*—Written notice of the intention to take a deposition shall be given to the adverse party, except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used,

and the time when and place whe
In case the deposition of a party t
it shall not be used in his own beha
specified that his deposition would
Sec. 5273).

"SEC. 11535. *Service of Notice.*
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DAVID

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DAVID

ROBERT A.

Appellants,

DAVID M. K

Appellee.

Appeal From Supreme Court of Ohio.

# BRIEF OF APPELLANTS UPON SUBMISSION UPON THESE APPEALS


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CRANEY DAVIS, *Toledo, Ohio,*
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THOMAS J. LYNCH, *Toledo, Ohio,*
HARRY S. BUGBEE, *Toledo, Ohio,*
*Of Counsel.*

IN THE

# Supreme Court of the United States

---

No.....

CHARLES N. BEVAN,

*Appellant,*

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO,

*Appellee.*

No.....

JOHN W. KOEHRMAN,

*Appellant,*

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO,

*Appellee.*

No.....

ROBERT A. STRANAHAN,

*Appellant,*

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO,

*Appellee.*

---

**Appeals From Supreme Court of Ohio**

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## BRIEF OF APPELLANTS UPON JURISDICTION UPON THESE APPEALS

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---

## BRIEF OF APPELLANTS UPON JURISDICTION UPON THESE APPEALS

---

The questions now under consideration are substantially the same in all three cases and one brief will suffice to present them.

The "Appellee's Statement Making Against the Jurisdiction Asserted by Appellant," filed in each case, is directed only to the point that the appellate jurisdiction of this Court should not be exercised because, as it is claimed, the appeals are for delay only and the questions involved are frivolous.

What is styled by the appellee as "Appellee's Statement Making Against Jurisdiction Asserted by Appellant" seems in substance and in fact to be (1) a statement making against jurisdiction, (2) a motion to dismiss the appeal, and (3) a brief in support of such motion. In each statement is the language, "We respectfully submit that this court should decline jurisdiction of this appeal upon the following grounds" (p. 5 a, Bevan; p. 6, Koehrman and Stranahan); and each statement concludes by submitting "that the record presents no substantial federal question which would warrant this court in taking jurisdiction and that the appeal has been taken for delay to frustrate the exercise of valuable rights by the Common Pleas plaintiff" (p. 15, Bevan; p. 16, Koehrman and Stranahan).

If motions to dismiss or affirm had been filed by the appellee the appellants would have had the right to file a reply brief under Rule 7, paragraph 3 of this Court. That right, we take it, does not depend upon the title by which an appellee designates the document which he files; and if the appellee's "Statements" in the present cases are to be considered by the Court as motions to dismiss, we assume that the Court will permit us thus to present our theory of the case and our views as to the law applicable thereto.

## I

## THE OPINION OF THE SUPREME COURT OF OHIO

The opinion of the Supreme Court of Ohio in these cases is officially reported as *Ex Parte C. N. Bevan, Ex Parte John W. Koehrman* and *Ex Parte Robert A. Stranahan*, 126 O. S. 126, and is set forth in full as Appendix A hereto.

## II

## THE NATURE OF THE CASE

It is unnecessary to restate here the nature of the cases, which already appears in the appellants' statements of the basis on which they contend that this Court has jurisdiction. We shall, however, note a few claims made in appellee's statements which are erroneous or misleading.

The appellee's claim that the notary was employed by appellants, or by both parties, rests solely upon the fact that after the plaintiff in the Common Pleas Court had employed him, the appellants requested him to furnish and paid for a transcript of the proceedings before him, which transcript formed part of his order of commitment of the appellant, C. N. Bevan, the entire order being attached as an exhibit to Bevan's "petition for a writ of *habeas corpus.*" The selection and employment of the notary and control of proceedings before him were by the plaintiff in the Common Pleas Court, the appellants merely securing copies of the proceedings had at the plaintiff's instigation.

While the order of commitment of the appellant, C. N. Bevan, formally recited that the notary adjudged that the questions asked and books, papers and documents demanded "are material to the issues in said cause" (in the Common Pleas Court), the notary himself testified, as shown by the Bevan record (p. 183), and it is undisputed that he did not in fact undertake to form a judgment upon the question of materiality but merely signed the order of commitment prepared and presented to him by the plaintiff's attorneys. Further, under the decision of the Supreme Court of Ohio in these very cases, the notary had no power or jurisdiction to make any such adjudication.

The reference to a "technical arrest" is probably intended to indicate that immediately after the arrests of the appellants they were liberated under bond by the orders of the Court of Appeals of Lucas County, Ohio, made after appellants had filed their respective "petitions for a writ of *habeas corpus.*" The returns of the appellee himself show that appellants were actually arrested; and except for their subsequent enlargement by the court, they would have continued in the appellee's custody. These cases are within the class referred to in *Wales vs. Whitney, Secretary of the Navy,* 114 U. S. 564 (1885), pp. 571, 572, "in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person arrested submits without force being applied. * * * The officer has the authority to arrest and the power to enforce it."

Appellee stresses the fact that *certiorari* was denied by this court in proceedings brought by these ap-

pellants, *C. N. Bevan, John W. Koehrman and Robert A. Stranahan against Gilson D. Light, as Sheriff of Lucas County, Ohio,* as respondent and appellee (Cases numbered 500, 501 and 502). They failed however to point out that the cases turned only upon the question whether the Federal courts had or should exercise jurisdiction in *habeas corpus* proceedings brought by these appellants because of the pendency of similar proceedings in the Supreme Court of Ohio and because, as it was claimed, the exercise of Federal jurisdiction might interfere with the determination of the questions by the state court. The merits of the cases were not passed upon either by the District Court, in which the proceedings were instituted, nor by the Circuit Court of Appeals for the Sixth Circuit.

## III

## THE FEDERAL QUESTIONS PRESENTED BY THESE APPEALS ARE SUBSTANTIAL AND THE APPEALS SHOULD BE HEARD ON THEIR MERITS.

Rather than reply in detail to the appellee's erroneous statement of the questions involved, we prefer, for the sake of brevity, to state the questions and our contentions as they actually are. We shall not, however, attempt any full discussion of their merits, which we conceive to be premature at this time, the only inquiry now being whether there is color of support for the Federal questions, and not whether, upon analysis and exposition, they may eventually be found to be unsound.

*Louisville & Nashville Railroad Company vs. Melton*, 218 U. S. 36, 49 (1910); *Milheim et al. vs. Moffatt Tunnel Improvement District et al.*, 262 U. S. 710, 716-717 (1923).

It will be seen that the questions are quite different from those posed by the appellee and that they do not depend upon any supposed necessity for the separation of powers between the executive, legislative and judicial departments of the state. Nor is it important, on the question of due process, whether the remedy provided for by Ohio General Code Section 11514 be *habeas corpus*, an action in the nature of *habeas corpus*, or otherwise, for whatever be the character of this remedy *hearing and relief can be had only after imprisonment.*

## A. Statement of the Questions

The appellants maintain:

1. That Ohio General Code Sections 11510, 11511 and 11512, as well as the operation of such sections and each of them as applied to the facts in these cases, deny the appellants due process of law and are unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that such sections as construed by the Supreme Court of Ohio, while providing that a witness summoned to testify before a notary public in the course of the taking of depositions for use in a civil action pending in a state court may *lawfully* refuse to give evidence not pertinent to the issues made or tendered by the pleadings, none the less purport to authorize and empower such notary public at will to commit and im-

prison such witness for contempt in failing or refusing to answer questions or to adduce the evidence demanded, without conferring upon such notary public (who is a mere ministerial or executive officer), *or upon any judicial tribunal*, the power to hear and determine *before the commitment and imprisonment of the witness* the question of the lawfulness of the refusal and the consequent guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness *after his imprisonment*, in which action he assumes the burden.

2. That the unconstitutionality of Ohio General Code Sections 11510, 11511 and 11512, as well as the unconstitutional operation of such sections and each of them as applied to the facts in these cases, is not cured by the remedy provided for in Ohio General Code Section 11514, for the reason that, whether the remedy afforded by Section 11514 be *habeas corpus*, an action in the nature of *habeas corpus*, or otherwise, by the terms of Section 11514, such remedy can be invoked only *after the witness has been imprisoned by order of the notary public without any hearing or determination as to his guilt or innocence of the alleged contempt*. Moreover, in invoking such remedy the witness must assume the burden of showing that the imprisonment was unlawful.

3. That Ohio General Code, Sections 11510, 11511 and 11512, as well as the operation of such sections and each of them as applied to the facts in these cases, deny the appellants due process of law and are unconstitu-

tional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that no opportunity is afforded by said sections or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned upon the order of the notary public.

4. That Ohio General Code, Sections 11510, 11511 and 11512, as well as the operation of said sections and each of them as applied to the facts in these cases, deny the appellants due process of law and are unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that said sections purport to authorize and permit the imprisonment and arrest of the appellants upon the order of a notary public, who, *as was the fact in these cases*, was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the compensation of such notary public being by law directly governed by the extent of the evidence the witness might be required to give, the notary public, therefore, having such a direct, substantial, personal pecuniary interest in the taking of the deposition and coercing the appellants to testify as to disqualify such notary public, were he otherwise empowered and qualified so to do, from hearing and determining whether the appellants' refusal to adduce the evidence demanded was unlawful and whether the appellants were guilty of contempt. *Tumey vs. Ohio*, 273 U. S. 510 (1926).

5. In the cases of the appellants Bevan and Koehrman, it is also maintained that the subpoena *duces tecum* served upon these appellants were so broad and sweeping in their terms as to constitute an unreasonable search and seizure in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

## B. Summary of Ohio Law and Decisions

Under Ohio General Code Section 11510 a witness may be punished only for an *unlawful refusal* to answer or to produce documents. A refusal is not unlawful if the evidence sought is not material or relevant to any issue in the case; *Ex Parte Jennings*, 60 O. S. 319 (1899); *Ex Parte Schoepf*, 74 O. S. 1 (1906). But the notary cannot either sustain or overrule any objection, nor determine the legal question (*i. e.*, the materiality or relevancy *for any purpose*) upon which the lawfulness of the refusal depends, *DeCamp vs. Archibald*, 50 O. S. 618 (1893); *Ex Parte Jennings, supra; Ex Parte Schoepf, supra*, p. 10, and the witness refuses to answer at his own peril, and notwithstanding that the notary cannot determine the lawfulness of the refusal, "his only recourse is to commit the witness to jail," as for an unlawful refusal, "leaving to a court of competent jurisdiction the determination of the question of relevancy upon application for release by *habeas corpus*." *In re Goode*, 16 Ohio Decisions (N.P.) 404 (1905).

So wholly devoid is the notary of any power to hear and determine anything, that in the instant cases the Supreme Court of Ohio strongly intimates, without expressly so holding, that the notary may have no right to

refuse commitment in any case at the request of counsel, and may in fact be required to commit a witness whenever counsel directs; a construction fairly epitomizing the actual operation of the statute, which would reduce the notary's function to that of a rubber stamp in the hands of counsel, vesting in them, in fact, the real power of commitment.

### C. The Ohio Statutes in Question Deny Due Process of Law

Due process of law requires notice and an opportunity to be heard by a competent judicial tribunal, whether it be a court or an officer vested with jurisdiction to hear and determine, *before commitment*. *Pennoyer vs. Neff*, 95 U. S. 714, 732 (1877); *Hurtado vs. California*, 110 U. S. 516 (1883); *Louisville Trust Co. vs. Comminger*, 184 U. S. 18 (1902); *Twining vs. New Jersey*, 211 U. S. 78, 101 (1908); *Coe vs. Armour Fertilizer Works*, 237 U. S. 413, 423-425 (1915).

Relief *after* imprisonment, whether it be by *habeas corpus* or by an application for discharge under Ohio General Code 11514, will not satisfy due process of law. *Coe vs. Armour Fertilizer Works, supra; Pennoyer vs. Neff, supra; Meyers et al. vs. Shields, County Treasurer*, 61 Fed. 713, 724 (C. C., N. D. Ohio, 1894); *People ex rel. McDonald vs. Leubuscher et al.*, 54 N. Y. S. 869, 34 App. Div. 577 (1898); *Callan vs. Wilson*, 127 U. S. 540, 554 (1888); and it is no answer, to one who protests against deprivation of liberty or property without due process of law, to say that in his particular case due process of

law would have led to the same result because he had no adequate defense on the merits. *Coe vs. Armour Fertilizer Works, supra.*

These cases are not within the class of proceedings where summary action without notice or hearing and postponement of judicial inquiry are permissible. Summary action and postponement of judicial inquiry constitute due process of law only in the assertion of the rights of the public against the property of the individual in the exercise of the public police power or the imposition of burdens upon his property for the public use where the nature of the subject-matter requires summary action, as, for instance, in matters of taxation, revenue and the exercise of the power of eminent domain.

In these cases the notary public, assuming that the statutes confer upon him the jurisdiction to hear and determine the subject matter, was disqualified to make any order against the appellants because he was selected and employed by, and the continuance of his employment was at the will of, the parties seeking to take the deposition, and the amount of his compensation was directly dependent upon the length of the depositions and the number of writings to be copied therein. *Tumey vs. Ohio,* 273 U. S. 510 (1927). The *Tumey* case reached this Court by writ of error to the judgment of the Supreme Court of Ohio. See also *Meyers et al. vs. Shields, County Treasurer, supra.* In this connection it should be kept in mind that the vice here complained of results from the normal operation of the statute claimed to be unconstitutional.

## D. The Federal Questions Were Properly Presented to the Court Below

All of the Federal questions presented by these appeals were properly presented to the Supreme Court of Ohio in accordance with the state practice and were actually considered and determined by that court. This Court will therefore regard the questions as duly made. *Miedreich vs. Lauenstein*, 232 U. S. 236, 243 (1914); *Mallinckrodt Chemical Works vs. State of Missouri at the Relation of Jones, Circuit Attorney of the City of St. Louis*, 238 U. S. 41, 49 (1915). Furthermore, the right of the appellants Koehrman and Stranahan, who declined to obey the subpoenas, to question the constitutionality of the state statutes involved and the qualifications of the notary is supported by *McGrain vs. Daugherty*, 273 U. S. 135 (1927); and the procedure employed was sanctioned by *In re George Sage*, 24 O. C. C. (N.S.) 7 (1915).

There being substantial questions as to the validity of the state statutes themselves, it is not important whether the question of their operation as applied to the facts of these cases should be reviewed as on appeal or as upon *certiorari*. Where the case concerns the misapplication of a statute by an officer, contrary to its terms and intent, the review is doubtless by *certiorari;* but where it is claimed that the statute is invalid as operating on or applied to a particular case, the question is properly reviewable on appeal. *Fiske vs. Kansas*, 274 U. S. 380, 385 (1927).

We know of no decision of this Court, and have been cited to none, that forecloses the present contentions ex-

plicitly or otherwise. In fact the reasoning of the decisions of this Court clearly supports them.

### E. Statutes of Other States

The mere existence in other states of statutes similar to these now under consideration, without any authoritative decisions as to their validity, is not persuasive; but since counsel for appellee seem to consider their existence important, we shall refer to them briefly.

The statutes of Nevada, Oregon, Utah, Arkansas, Louisiana and New Hampshire confer no authority upon officers taking depositions to commit witnesses for refusal to testify, as do the Ohio statutes, the only authority given being to compel their attendance.

The Arkansas statutes apparently constitute the notary a judicial officer, empowering him to decide summarily all objections to questions, to prevent misleading questions and to stop an unreasonable or vexatious course of interrogation, none of which power is vested in notaries under the Ohio statutes.

In Florida an examination of witnesses before trial appears to be pursuant to order of court upon the propounding of written interrogatories and is had before two commissioners, one of whom is appointed by each of the parties. They may commit for refusal to testify only by joint action.

Under the Iowa statute the power of punishment for contempt is vested only in judicial officers so that if notaries in the taking of depositions possess that power, which is not clear, it is because they are in that state vested with judicial power.

Only in the states of Kansas, Nebraska and Missouri has the constitutionality of the other statutes referred to in appellee's statement been passed upon so far as we can find.

In Kansas like statutes purporting to authorize commitment by the notary were held unconstitutional. *In re Huron,* 58 Kan. 152, 48 Pac. 574 (1897).

In Missouri the question of due process involved in the present case was not before the court. The Missouri statute was upheld on the ground that in the taking of depositions the notary public under the Missouri law acted judicially, as a judicial officer. *Ex Parte Noell,* 293 S. W. 488 (St. Louis, Missouri, Court of Appeals, 1927). The reasoning of that case certainly lends no support to the conclusion reached by the Ohio Supreme Court.

California also has statutes very similar to those of Ohio, and the section authorizing commitment was held unconstitutional in *Burns vs. Superior Court of the City and County of San Francisco,* 140 Calif. 1, 73 Pac. 597, 602 (1903).

A statute of the State of New York similar in principle and involving the same vice was considered and held unconstitutional in *People ex rel. McDonald vs. Leubuscher et al., supra.*

A statute authorizing the attorney general to summon witnesses and to imprison was held unconstitutional in *Ward Baking Co. et al. vs. Western Union Telegraph Co. et al.,* 200 N. Y. S. 865, 205 App. Div. 723 (1923), and Kansas statutes conferring similar powers upon a county attorney were also held unconstitutional in *In re Ziebold,* 23 Fed. 791 (C. C., D. Kan., 1885), and *In re Sims,* 54 Kan. 1, 37 Pac. 135, 136 (1894).

See also *Interstate Commerce Commission vs. Brimson*, 154 U. S. 447 (1894); *Kilbourn vs. Thompson*, 103 U. S. 168 (1880); *In re Mason*, 43 Fed. 510 (D. C., Minn., 1890).

It will thus be seen that no other state court has yet accepted the extreme position taken by the Supreme Court of Ohio.

## IV. CONCLUSION

We submit that the questions involved are neither frivolous nor foreclosed by any decision of this Court but are substantial and should be considered on their merits. We also submit that an examination of the record in this case and also of the *certiorari* proceedings in this Court which were brought by these appellants and are referred to above and in appellee's statements, will show that these appellants instead of trying to prolong or delay the proceedings have from first to last acted with the utmost expedition and have prosecuted the proceedings which they instituted with all the speed and diligence which the mere mechanical requirements of appellate procedure permit and have not sought delay at any time.

Respectfully

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CRARY DAVIS,
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## APPENDIX A

Ex parte C. N. Bevan
Ex parte John W. Koehrman
Ex parte Robert A. Stranahan

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpoena.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is

claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpoenas *duces tecum*, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

(Nos. 23652, 23653 and 23654—Decided January 25, 1933.)

Error to the Court of Appeals of Lucas County.

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases. An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff

in error, C. N. Bevan, was held under a commitment issued by a notary public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpoena *duces tecum*, in the course of the taking of his deposition in the suit of *Clara Sielcken-Schwarz v. The Woolson Spice Company et al.*, pending in the Common Pleas Court of Lucas county. The plaintiffs in error, John W. Koehrman and Robert A. Stranahan, had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpoenas personally served upon them.

The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error, John W. Koehrman and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrman and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the

Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in association with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants, taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the Common Pleas defendants and subpoenas *duces tecum* were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the Common Pleas plaintiff were served with a motion to quash the notice to take depositions and the subpoenas *duces tecum*, and to enjoin the taking of depositions. This motion came on for hearing before the Common Pleas Court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court an agreement was reached between counsel for the Common Pleas plaintiff and chief counsel for the Common Pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the Common Pleas defendants, subpoenas *duces tecum* upon the plaintiffs in error Bevan and Koehrman, and ordinary subpoenas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a.m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpoena. The witnesses, Koehrman and Stranahan, disregarded their subpoenas and failed to appear. On the failure of three of the witnesses summoned to appear and the failure of the witness, Bevan, to make any com-

pliance with his subpoena *duces tecum,* the notary adjourned the hearing until 2:00 p.m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpoena. Prior to this adjourned time for the taking of these depositions, a supplemental motion to quash the new notices and subpoenas, and to enjoin the taking of depositions in the Common Pleas suit was filed in the Common Pleas Court. At 2:00 p.m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpoena *duces tecum.* Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpoena *duces tecum.*

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in

obedience to their subpoenas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a.m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of *habeas corpus*, were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and common pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the

Court of Appeals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the Common Pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpoenas *duces tecum* called for material, books and papers and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpoenas.

On June 22nd the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on June 29th these applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch, for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson, and Messrs. Fraser, Hiett, Wall & Effler, for defendant in error.

Stephenson, J. These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpoena and Bevan and Koehrman were served with subpoenas *duces tecum.*

No complaint is made as to the service of the subpoenas. It is contended that the subpoenas *duces tecum* "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case, *it is significant* that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpoenas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpoena *duces tecum,* giving as his reason therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested

and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of *habeas corpus,* except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. *Bevan v. Light, Sheriff,* (C. C. A.), 61 F. (2d), 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders, are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to perform the duties of the

office, or ascertain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine" and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpoena or refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony, and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost, and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. Notices are regularly served to take depositions of the officers of an adversary corporation. Subpoenas are regularly served. One officer appears in obedience to his subpoena, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of competent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpoenas *duces tecum* did call for the pro-

duction of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpoenas as unreasonably comprehensive, or that they constitute unlawful search and seizure.

Clara Sielcken-Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals which heard the case: 24 Corpus Juris, 797, Section 1981, 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N.S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or that the action is barred by the statute of limitations, or Clara Sielcken-Schwarz should not prevail in her suit because

of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpoenas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpoena, does not exercise judicial power, and we see no good reason why

we should depart from this long-established rule: DeCamp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C.J., and Kinkade, J., not participating.

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IN THE

# Supreme Court of the United States

October Term, 1932

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No. 784

C. N. BEVAN, *Appellant*,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee*.

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No. 785

JOHN W. KOHNMAN, *Appellant*,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee*.

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No. 786

ROBERT A. STRANAHAN, *Appellant*,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee*.

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Appeals from the Supreme Court of the State of Ohio

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## BRIEF IN BEHALF OF APPELLANTS

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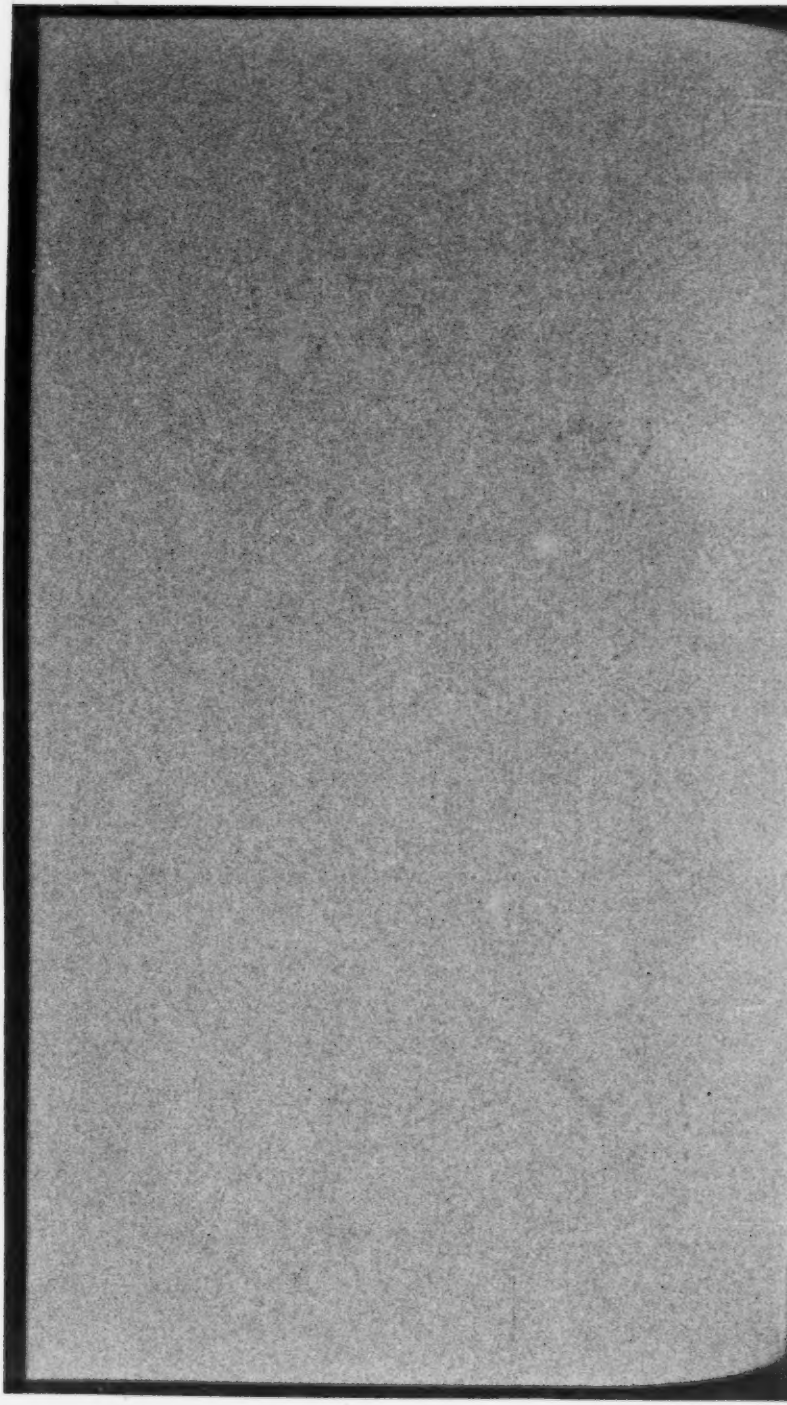

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IN THE

# Supreme Court of the United States

October Term, 1932

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No. 784

C. N. BEVAN, *Appellant,*

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee.*

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No. 785

JOHN W. KOEHRMAN, *Appellant,*

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee.*

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No. 786

ROBERT A. STRANAHAN, *Appellant,*

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee.*

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## BRIEF IN BEHALF OF APPELLANTS

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### I

### THE OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Ohio, rendered on January 25, 1933, is reported in 126 Ohio St. 126, 184 N. E. 393. It is printed herein as Appendix A with bracketed paragraph numbers supplied.

The opinion of the Court of Appeals for Lucas County, Ohio, is not officially reported. It is unofficially reported in 12 Ohio Law Abstract 598, and is printed at page 133 of the *Bevan Record;* page 110 of the *Koehrman Record;* and page 108 of the *Stranahan Record.*

## II

## STATEMENT OF THE CASES

These suits involve the constitutionality under the due process clause of the Federal Constitution, of certain sections of the Ohio General Code, providing for the arrest and imprisonment of witnesses by order of a notary public for their failure or refusal to appear or to testify upon the taking of depositions in advance of trial for use in a civil action pending in a state court. The question presented has never been passed upon by this Court.

Under these sections, as construed by the Supreme Court of Ohio, the notary *should* require a witness to answer only questions and produce only documentary evidence which are "pertinent to the issues tendered or made" and "in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceedings in chancery"; but the notary has the *power* to order the imprisonment of a witness for refusal to answer incompetent, irrelevant or immaterial questions and for the refusal to produce wholly incompetent, irrelevant or immaterial documentary evidence. The witness may disobey such order only at his peril. The notary public is not

vested with power or jurisdiction to hear and determine any questions as to the competency, relevancy or materiality of any evidence. He may, however, without determining any of these questions, order a witness to be committed to jail until he answers. No opportunity is afforded by the Ohio statutes for judicial review of any such order *prior to imprisonment.* It thus appears that the question as to whether a witness should be imprisoned is by the laws of Ohio left to the uncontrolled will of a ministerial or executive officer, who has no authority to determine what would be a proper exercise of his statutory power and whose decision to imprison or not to imprison depends upon nothing but his mere will.

The cases are actions in *habeas corpus,* engendered by the imprisonment of the respective appellants (the petitioners below) by the sheriff of Lucas County, Ohio, under an order of commitment for the petitioner Bevan (*Bevan,* 46)* and orders of attachment for the petitioners Koehrman and Stranahan (*Koehrman,* 45); *Stranahan,* 42), issued by a notary public, to the sheriff of Lucas County, in the course of an attempt to take depositions in a civil action between private individuals, pending in the Common Pleas Court of Lucas County (*Bevan,* 70; *Koehrman,* 48; *Stranahan,* 46).

A subpoena *duces tecum* was served upon the petitioner Bevan, as secretary-treasurer of The Woolson Spice Company (one of the defendants in the civil action) requiring the production of almost innumerable books, writings and records of the company (*Bevan,* 44). A subpoena *duces tecum* was likewise served upon

*Note: The three records are referred to by the respective names of the appellants.

the petitioner Koehrman (another of the defendants) also requiring the production of a large number of books and writings (*Koehrman*, 43). The drag-net character of these subpoenas *duces tecum* will be referred to later herein.

A subpoena was served upon the petitioner Stranahan, who was also one of the defendants in the civil action (*Stranahan*, 43).

Upon the taking of the depositions the petitioner Bevan refused to answer certain questions propounded and to produce the books or writings demanded (*Bevan*, 55-66). The taking of the deposition was adjourned, and in the absence of said petitioner, without notice to him or his counsel and without any hearing or opportunity therefor, at the request of the attorneys for the plaintiff in the civil action, the notary public signed and issued to the sheriff of Lucas County an order of commitment for this petitioner, which the attorneys had prepared for his signature. Although this order of commitment recites that the notary public "adjudged" that the evidence demanded was material and that he "ordered and adjudged" that Bevan be imprisoned, the notary himself testified that he did not "undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material" and that he "simply signed the paper presented to him by counsel for the plaintiff" in the civil action (*Bevan*, 112; *Koehrman*, 89; *Stranahan*, 87.)

The petitioners Stranahan and Koehrman did not appear at the time desired by the attorneys for the plaintiff in the civil action but offered to appear when the examination of the petitioner Bevan had ended. With-

out anything further, separate orders of attachment were issued for them by the notary, directing the sheriff of Lucas County to attach these two petitioners and have each of them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena, as to give his testimony in the action * * *" (*Bevan*, 113; *Koehrman*, 90; *Stranahan*, 88).

The notary public's employment by plaintiff and her attorneys was not only as notary but also as stenographer. The continuance of his employment was at their pleasure and was upon such terms that his compensation depended entirely upon the amount of testimony which he could force the petitioners to give and the number of exhibits which he could require them to produce to be copied, so that he had a direct, substantial, personal, pecuniary interest in the taking of depositions, in the extent of oral examination and in dragging before him as many books and writings as possible (*Bevan*, 114; *Koehrman*, 91; *Stranahan*, 89).

The sheriff executed the orders of commitment and attachment by taking each of the petitioners into custody.

After being taken into custody, the petitioners severally brought *habeas corpus* actions in the Court of Appeals for Lucas County, Ohio, writs were issued, and the petitioners were admitted to bail pending hearing (*Bevan*, 37; *Koehrman*, 36; *Stranahan*, 36). Upon final hearing the Court of Appeals discharged the writs of *habeas corpus* theretofore issued, dismissed the petitions and remanded each of the petitioners to the custody of the sheriff (*Bevan*, 39; *Koehrman*, 38; *Stranahan*, 38). Separate proceedings in error were filed in the

Supreme Court of Ohio, which heard the cases together and which in a single opinion affirmed the lower court.

In ordering the commitment of the petitioner, Bevan, and the arrest and attachment of the petitioners, Koehrman and Stranahan, the notary public purported to act under Ohio General Code Sections 11510, 11511 and 11512, inclusive, printed at pages 13 and 14 of this brief.

## III

## SPECIFICATION OF THE ASSIGNED ERRORS WHICH ARE INTENDED TO BE URGED

1. The Supreme Court of Ohio erred in not holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, are in conflict with the provisions of the Fourteenth Amendment, in that they deprive appellants of their liberty and property without due process of law (Fourth assignment of errors; *Bevan*, 4; *Koehrman*, 4; *Stranahan*, 4), for the reasons that:

(a) Said sections as construed by the Supreme Court of Ohio *permit imprisonment to come before trial* in that they purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness (who under the law of Ohio may at his peril refuse to give evidence not pertinent to the issues made or tendered by the pleadings) for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the

witness, the question of the materiality, relevancy and competency of the evidence demanded and the consequent guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness *after his imprisonment*, and in which he assumes the burden; and in that no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Federal Constitution and as to the jurisdiction of the notary public, to the determination of a competent judicial tribunal *before* the witness is declared to be guilty of contempt and imprisoned by the order of the notary public (Sixth assignment of error; *Bevan*, 5; *Koehrman*, 5; *Stranahan*, 4).

(b) Said sections attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books and writings be produced, and to commit or refuse to commit as for contempt witnesses, who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books or writings ordered to be produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books or writings (Tenth assignment of error; *Bevan* 7; *Koehrman*, 7; *Stranahan*, 7).

(c) Said sections attempt to confer upon notaries public, who, under the laws of Ohio, are mere ministerial

or executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them occurring in their presence (Eleventh assignment of error; *Bevan*, 7; *Koehrman*, 7; *Stranahan*, 7).

2. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512, and each of them, as applied to the facts in these cases, is in conflict with the provisions of the Fourteenth Amendment, in that no provision is made by said sections, or by the law of Ohio, for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court or by any judicial tribunal, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel; and in that said sections provide, or attempt to provide, that the notary public may commit these appellants for contempt, without notice of any hearing to them, and without providing or affording an opportunity for appellants to be present at a hearing and to defend in person or by counsel, before finding and adjudging appellants to be guilty of contempt and issuing an order of commitment confining them in the county jail of Lucas County, Ohio; and in that in the *Bevan* case the notary public did not in fact give said appellant any notice of any hearing, or afford him an opportunity to be present at a hearing and defend in person or by counsel, before finding and adjudging him to be guilty

of contempt and issuing an order of commitment confining him in the county jail of Lucas County (Seventh assignment of error; *Bevan*, 5; *Koehrman*, 5; *Stranahan*, 5); and in not finding and adjudging that the alleged or attempted adjudication by the notary in the *Bevan* case, that any questions propounded to him and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and the alleged or attempted adjudication that the appellant Bevan was in contempt, and the issuing of an order of commitment, all in his absence and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of said appellant's rights under the Fourteenth Amendment (Eighth assignment of error; *Bevan*, 6).

3. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellants, when committed by a notary public under said sections, and erred in not holding that said Sections 11510, 11511 and 11512 construed together with Section 11514, are in conflict with the provisions of the Fourteenth Amendment (Fifth assignment of error; *Bevan*, 4; *Koehrman*, 4; *Stranahan*, 4).

4. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in these cases do not deny appellants due process of law and are not repugnant to the Fourteenth Amendment, in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the commitment and imprisonment of appellants by a notary public who, as was the fact in these cases, was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witnesses (these appellants) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witnesses (these appellants) to testify; and in that the said notary public was thereby disqualified from determining whether these appellants were guilty of contempt for failing or refusing to give the evidence demanded and disqualified from ordering appellants' commitment (Twelfth assignment of error; *Bevan*, 8; *Koehrman*, 8; *Stranahan*, 7); and further in not finding and adjudging that on the facts in these cases the notary public was disqualified and without jurisdiction so to act for the reasons above set forth, and that therefore said notary public's acts in adjudging and bringing about the appellants' imprisonment were a denial of due process of law in violation of the Fourteenth Amendment (Thirteenth assignment of error; *Bevan*, 8; *Koehrman*, 8; *Stranahan*, 8).

5. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512, and each of them, and the operation of such sections and each of them, as applied to the facts in the *Bevan* and *Koehrman* cases are in conflict with the Fourteenth Amendment, in that they deprive said appellants of security in their person, papers and possessions, and subject them to unreasonable search and seizure (*Bevan* case, Fourteenth assignment of error, *Bevan*, 9; *Koehrman* case, Fourteenth assignment of error, *Koehrman*, 9).

## IV

## ARGUMENT

### 1. THE OHIO STATUTES AS CONSTRUED BY THE SUPREME COURT OF OHIO

#### A. Sections Of The Ohio General Code Involved

Although only Ohio General Code Sections 11510, 11511 and 11512 are directly attacked before this court, it is necessary to set forth other sections in order to view the legislative scheme for taking depositions in advance of trial in connection with civil suits in the courts of Ohio.

Section 11526* relates generally to testimony by deposition. This section reads:

> Sec. 11526. "Either party may commence taking testimony by deposition at any time after service upon the defendant."

*Note: All the sections here referred to are sections of the Ohio General Code.

Koehrman and Stranahan as defendants in the Common Pleas action, and Bevan, as an officer of The Woolson Spice Company, also a defendant in the Common Pleas action, were ordered to appear to be examined as if under cross examination (Koehrman and Bevan being also ordered to produce certain books and writings), under the provisions of Section 11497, which provides as follows:

> Sec. 11497. "At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony."

Section 11529 specifies the officers authorized to take depositions:

> Sec. 11529. "Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission."

Section 11502 (not necessary here to be quoted) authorizes the issuance of a subpoena by an officer authorized to take depositions.

Section 11503, relating to the production of books and records, is as follows:

> Sec. 11503. "A subpoena shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a wit-

> ness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, *which he may be compelled to produce as evidence.*" (Italics ours.)

Section 11537 is a statutory recognition of the custom that the notary before whom the deposition is taken acts also as a stenographer and transcribes the testimony:

> "Sec. 11537. "The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness."

The sections directly under attack in this court, relating to the power of the notary to commit the witness for contempt, are as follows:

> Sec. 11510. "Disobedience of a subpoena, a refusal to be sworn, except upon failure to pay fees duly demanded, and *an unlawful refusal to answer* as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." (Italics ours.)

> Sec. 11511. "When a witness fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except

that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him."

Sec. 11512. "Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition."

There is no statutory provision requiring or permitting any judicial review of a notary's order of imprisonment *prior* to its execution.

Section 11514 relates to discharge only *after* imprisonment on the order of a notary public:

Sec. 11514. "A witness *so imprisoned* by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (Italics ours.)

### B. Decisions Of The Supreme Court Of Ohio

The operation and effect of these statutes as construed in the decisions of the Supreme Court of Ohio will now be discussed.

The notary in committing Bevan for his refusal to answer questions and to produce books and writings was acting in exercise of the power purported to be conferred upon him by Sections 11510 and 11512 to punish as a

contempt of him "an unlawful refusal to answer as a witness (Sec. 11510)" by imprisonment in the county jail "there to remain until he submits to be sworn, testifies, or gives his deposition (Sec. 11512)."

Petitioners Koehrman and Bevan were taken into custody upon attachments issued by the notary pursuant to Section 11511 to bring each of them before the notary "to give his testimony and answer for the contempt" in disobeying the subpoena of the notary (Sec. 11511), who was empowered summarily to punish the "disobedience of a subpoena" as a contempt of him (Sec. 11510) by fine or imprisonment (Sec. 11512).

An adequate view of the operation and effect of the state statutes, as interpreted by the Supreme Court of Ohio, requires consideration of the decision in the instant case together with five earlier decisions involving these statutes by the same court.

It will be convenient at the beginning to state the effect of these decisions, leaving a statement of the cases to follow.

The operation and effect of the statutes in question under the decisions of the Supreme Court of Ohio are as follows:

1. Sections 11497 and 11503 authorize the compulsion from a witness called for examination by deposition before a notary public, *of only such evidence as is competent and relevant to the issues made or tendered by the pleadings in the action in which the deposition is being taken. Ex Parte Jennings*, 60 Ohio St. 319, 54 N. E. 262 (1899); *Ex Parte Schoepf*, 74 Ohio St. 1, 77 N. E. 276 (1906).

2. As a corollary to proposition (1) above, a witness called for examination before a notary public under Section 11497, may lawfully refuse to answer a question or to produce a document or writing that is incompetent or irrelevant, and his refusal to obey the order of the notary public constitutes a contempt for "*an unlawful refusal to answer*" within the meaning of Section 11510 *only if the order calls for the production of evidence that is competent and relevant. Ex Parte Jennings, supra; Ex Parte Schoepf, supra.*

3. Notwithstanding that by statute the witness is privileged from being compelled to produce evidence that is incompetent or irrelevant, and the statute sanctions punishment as for contempt only for a refusal to obey an order to produce evidence that is competent and relevant, yet *the notary public has no power to hear and determine the question of the competency or relevancy of the evidence sought to be elicited, in connection with and as determinative of, the question whether the witness has committed the offense of contempt as defined by statute. DeCamp vs. Archibald,* 50 O. S. 618, 35 N. E. 1056 (1893); *Ex Parte Jennings, supra; In re Raub,* 65 O. S. 128, 61 N. E. 701 (1901); *Ex Parte Schoepf, supra.*

4. If the witness refuses to answer upon the ground that the answer is incompetent or irrelevant he does so at his own peril, for the notary public may summarily commit him as for contempt, if indeed it is not the duty of the notary public so to do upon the request of the adverse party, without affording an opportunity for hearing on, and without making any determination of, and without power in the notary public *at any time,* or

in any judicial tribunal *before* imprisonment of the witness, to hear and determine, the question whether the evidence demanded is competent and relevant and whether the witness has committed the offense charged. See cases cited at paragraph 3 above, and *Ex Parte Bevan* (instant case) at Appendix A herein.

5. A witness summarily committed as for contempt by a notary public without hearing or determination must either submit to imprisonment or assume the burden of instituting proceedings before a court or judge under Section 11514 (or by *habeas corpus* if the proceeding under Section 11514 be not *habeas corpus*) for discharge from custody. The act of the notary public, being conclusive unless the witness initiates a separate proceeding, has the finality of and the same force and effect as a judgment of a court of general jurisdiction. See cases cited at paragraph 3 above, and *Ex Parte Bevan* (Appendix A).

The cases above cited will next be reviewed in sequence of date, leaving to the last a more extended review of the opinion of the Ohio Supreme Court in the instant case (Appendix A).

In this connection it is to be noted that Section 11510, which provides that "an unlawful refusal to answer as a witness" may be punished as a contempt, was formerly Section 5252 of the Revised Statutes of Ohio which provided that "a refusal to answer as a witness * * * when lawfully ordered" might be punished as a contempt. This change in phraseology was introduced in the codification of the laws of Ohio of 1910, and subsequent decisions of the Ohio courts recognize no distinction in substance.

All the cases above cited were proceedings in *habeas corpus* to discharge from custody a witness who had been committed by a notary public upon refusal to obey the order of the notary public to answer questions or produce documents. In each case the court determined the competency and relevancy of the evidence sought to be adduced, and in *Ex Parte Jennings, supra,* and *Ex Parte Schoepf, supra,* the court discharged the witness from custody upon finding that the questions ordered to be answered or the documents ordered to be produced were incompetent or irrelevant.

In *DeCamp vs. Archibald, supra,* the syllabus, which under Rule VI of the Supreme Court of Ohio states the points of law decided, is in part as follows:

> "2. The power conferred by sections 5252 and 5254, Revised Statutes (General Code Sections 11510 and 11512), on a notary, or other officer, in taking depositions, to commit a witness to the jail of the county for refusing to answer a question, is not judicial in the sense of the constitution, conferring all judicial power upon the courts of the state.
>
> "3. Where the question propounded involves no question of privilege on the part of the witness, it is his duty to answer, if ordered by the notary to do so. The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken; and if he refuses to do so, when ordered, he may be committed as a contumacious witness."

In the discussion concerning the constitutionality of these statutes under the State Constitution the court said (P. 626):

> "* * * Any abuse is carefully guarded against, by the power given any judge by § 5255, Revised

Statutes (General Code Section 11514), on application of the witness, to discharge him if he find the imprisonment to be illegal."

In *Ex Parte Jennings, supra,* the syllabus is as follows:

"A witness whose deposition is being taken before an officer may refuse to testify to facts not relevant to the issues in the case in which the deposition is to be read, if the disclosure of such irrelevant facts would be injurious to the business of the witness; and, if imprisoned by the officer for such refusal, he may be discharged on *habeas corpus.*"

In the opinion it was said by Shauck, J. (Pp. 328-331):

"* * * *The language of the section conferring authority upon the officer to punish a witness for refusing to answer 'when lawfully ordered' implies that punishment cannot be imposed for every refusal.* (P. 328.)

"It is familiar that *an objection to the competency of the evidence to be elicited, when interposed by a party to the action in which the deposition is taken, cannot be either sustained or overruled by the officer.* In such case the question of competency is for the court. But it seems quite consistent with the purpose for which depositions are taken that *a witness may refuse to make disclosures which would operate to his personal prejudice without aiding the court in determining the rights of the parties, by reflecting either upon the issues in the case or upon the credibility of the witness.* * * *

"* * * In *DeCamp v. Archibald,* so confidently relied upon to justify this imprisonment, it was clearly pointed out in the opinion that the question which the witness refused to answer was com-

petent. *Indeed it does not seem to have been finally determined in any case that the personal liberty of the citizen is of so little importance that it should yield to a desire to gather food for idle gossip.*" (Pp. 328, 329, 330.) (Italics ours.)

* * * * *

"We do not suppose that any interest which the witness may have in concealing the facts which the question propounded was designed to elicit would excuse him from answering, if the facts were relevant to the issues in the case on trial; nor that the sincerity of his belief that the facts are irrelevant would shield him from imprisonment if the court should be of the opinion that they are relevant. *If he refuses to answer upon the ground that the answer is incompetent he does so at his own peril.* It seems, however, entirely clear that in this case the opinion of the witness as to the irrelevancy of the question is correct." (P. 331.) (Italics ours.)

In *In re Rauh, supra,* the court said at page 135:

"* * * Whether or not the substance of the deposition is incompetent, is to be left to the subsequent determination of the court; as is also the question whether a command to produce books, papers or other thing under the control of the witness relates to such books, writings or other thing as he may be compelled to produce. If the witness assumes to decide these questions for himself at the time, unless the interrogatory involves a question of privilege, he must do so at his peril. If he should be right in his decision he would lose nothing; if wrong, he must suffer the consequences."

This amounts to saying that whether he is right or wrong he must go to prison. If he can employ counsel and convince a court that he is right he will get out of prison—but it hardly seems correct to say that he has lost nothing in such case.

In *Ex Parte Schoepf, supra,* the syllabus of the case reads in part as follows:

> "4. While an officer before whom a deposition is being taken is empowered to punish as for contempt any person who refuses to obey an order to answer a question or to produce a document, he cannot do so unless it is so 'lawfully ordered'; and where such question or document is not pertinent to the issues tendered or made, or is not material or necessary to make out the case of the party calling for it, or is incompetent or privileged, the witness cannot lawfully be ordered to answer such question or to produce such document."

That case interprets Sections 11503 and 11551 to limit the authority of the notary to order the production of only such books and records as contain evidence pertinent to the issues and material and necessary to make out the case of the adverse party. Thus it is stated in the syllabus of that case:

> "1. The clause in section 5247, Revised Statutes (General Code Section 11503), 'which he may be compelled to produce as evidence,' and as used in *In re Rauh*, 65 Ohio St. 128, must be construed with section 5289, Revised Statutes (General Code Section 11551), and is therefore limited to evidence pertinent to the issue, in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery.
>
> "2. The rule in chancery as to compelling the production of documents for the purpose of evidence and inspection was and is that a party is entitled to a discovery of such facts or documents in his adversary's possession or under his control, as are material and necessary to make out his own case; but that this right does not extend to a discovery of the manner in which the adverse party's case is to be established, nor to evidence which relates exclusively to the adverse party's case."

In the opinion of that case it was said:

> "It was clearly pointed out in *Ex Parte Jennings*, 60 Ohio St. 319, that *neither the officer who takes a deposition nor the court on the trial of the case, has power to punish a witness for disobedience of a subpoena or a refusal to answer except when the witness has been 'lawfully ordered.'* Section 5252, Revised Statutes (General Code Section 11510). And in that case and the *Rauh* case also it was said that when the witness undertakes to decide upon the question whether he has been 'lawfully ordered' he does so at his own peril. *It is the same whether a question of privilege is involved or whether it is only a matter of incompetent or irrelevant evidence.* * * * Accordingly it was nowhere said in either of the decisions of this court already referred to, nor was it intended to be inferred, that a witness might be compelled to surrender to his adversary a coveted document, before the right to compel production of it had been submitted to the judgment of a competent tribunal; but the correlative proposition that a witness might take the chances of being sustained on a refusal to answer an incompetent or irrelevant question was distinctly asserted. It would seem, therefore, that the power of a notary public in the taking of depositions and the limitations imposed thereon have been clearly defined by the statutes and the previous decisions of this court." (Pp. 10, 11.)
>
> "* * * Yet counsel still insist that the witness may be compelled by imprisonment to disclose facts which they admit could not be admissible on the trial. From what we have already said it results that the notary public had no such power * * *." (P. 11.)
>
> * * * * *"

It seems clear that in speaking of the "power" of the notary to punish for contempt the court meant power

sustainable in the courts as distinguished from power to commit a witness to prison there to stay until such witness by an independent proceeding in a court can secure his release by judicial process. The latter "power" is just what all of the decisions show he does have regardless of the relevancy or competency of the evidence sought to be elicited.

*Benckenstein vs. Schott*, 92 O. S. 29, 110 N. E. 633 (1915), held Sections 11510 and 11512, empowering a notary to commit a witness for refusal to testify, to be constitutional and to afford due process under the Federal Constitution. The ground of the decision appears in the following quotation from the opinion:

> "* * * In the case at bar, when plaintiffs in error perform the act required of them, the commitment is at an end, or, under the provisions of Section 11514, they have the right to apply to a judge, who may discharge them if it appears that the imprisonment is illegal.
>
> "It is said by the supreme court of the United States that due process of law has never been precisely defined, but it does not require a plenary suit or a trial by jury, nor is it necessarily judicial procedure. In *Iowa Central Ry. Co. v. Iowa*, 160 U. S., 389, it is held: 'The fourteenth amendment to the constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided.' We think these requirements are met by the procedure provided in the statutes under consideration, and we are unable to say that there has been a failure of due process of law in the proceeding which is challenged by plaintiffs in error." (Pp. 41, 42.)

In the review which follows of the opinion of the Ohio Supreme Court in the instant case, *Ex Parte Bevan,* reference will be made to the bracketed paragraph numbers supplied by us in Appendix A.

After discussing the facts of the instant cases [17] to [24] and the statutory method for appointment of notaries public [25] and [26], the court said:

> [27] "Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, *just because he has no power to 'hear and determine'?*" (Italics supplied.)

The court then turned to the subject of the separation of the legislative, executive and judicial functions of government [28] and [29], stated that a notary public is a ministerial or an executive officer [30], and concluded that the power to commit delegated to him is not a judicial function [31], a conclusion rested on previous decisions of the same court [48] and fortified by the fact that such power "is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, * * * whether he will or will not commit [31]." In fact, the court inclined to the view that the provisions of Section 11512 that the notary "may fine" or "may imprison" for disobedience of the order of a subpoena or refusal to testify, *are mandatory,* so that, if the adverse party conducting the examination requested the notary public to imprison the witness upon his refusal to answer some question or produce some document, and the notary declined to accede to this request (supposedly for any reason thought proper by the notary public if he

should arrogate any discretion to himself, *e. g.*, that the question was grossly irrelevant or frivolous), mandamus would issue to compel the notary public to fine or commit the witness [32] to [37]; but the court said that it was not necessary to hold that section to be a mandatory statute in this case (presumably for the reason that the notary public in this case did exercise his power of coercion on request of the adverse party) [38].

The court next passed on issues raised in the state courts as to the competency of the testimony demanded and various points of procedure under the state law [39] to [45], questions which are not before this Court. There then follow the conclusions of the court on the subject of due process of law under the federal constitution, as follows:

> [46]. "The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of *Tumey v. Ohio*, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243."
>
> [47]. "The review of the action of the notary in committing relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law."
>
> * * * * *
>
> [49]. "These cases [*DeCamp vs. Archibald*, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; *Benckenstein vs. Schott, Sheriff*, 92 Ohio St. 29, 110 N. E. 633] are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law."

It is thus to be seen that the Ohio Supreme Court in the instant case expressly acknowledged ([27] quoted above) that the notary public has no power to hear and determine the competency or relevancy of testimony sought to be compelled. In this respect the court followed its holding in the prior cases of *DeCamp vs. Archibald, supra; Ex Parte Jennings, supra; In re Rauh, supra;* and *Ex Parte Schoepf, supra,* that a witness who undertakes to decide upon the question whether his refusal to answer would constitute a contempt as "an unlawful refusal to answer (Sec. 11510)," does so at his own peril, for he may be summarily committed for contempt by the notary public under Section 11510, notwithstanding that the notary public has no power to hear and determine whether the question asked was competent or relevant and hence whether such refusal was "an unlawful refusal to answer (Sec. 11510)" and in fact a contempt.

Moreover, the conclusion that the notary public has no power to hear and determine the subject matter of the offense of contempt, though possessing arbitrary power of commitment for such offense, is impelled from the facts on which rests the decision of the Ohio Supreme Court in the instant case (*Ex Parte Bevan*). It appears explicitly in the record of these proceedings that the notary public held no hearing and gave no consideration on his part to the question whether the documents ordered to be produced and the questions ordered to be answered were material and relevant to the issues. The following is quoted from the examination of the notary public (*Bevan*, 112; *Kochrman*, 89; *Stranahan*, 87):

"Mr. Welles: Your commitment further reads: 'The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A'; did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues? A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case? A. Yes, sir.

Q. Are you a lawyer? A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case? A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right? A. Yes, sir."

The conclusion of the Ohio Supreme Court in the instant case that the statutes afford due process of law under the Federal Constitution was placed expressly on the right of the witness under Section 11514, *after his imprisonment on the order of an officer having no jurisdiction to hear and determine the subject matter of the offense for which the witness was committed,* to apply to a judge of a state court for discharge from imprisonment, at which time the imprisoned witness is afforded his first opportunity for a hearing on and determination of the question whether his refusal to answer was in fact a contempt of the notary as an "unlawful refusal" (Sec. 11510); and hence whether his imprisonment is

illegal (Sec. 11514). See paragraph [47] of the opinion set forth above. This conclusion follows the same view expressed in *DeCamp vs. Archibald, supra,* and *Benckenstein vs. Schott, supra.*

In other words, the Supreme Court of Ohio holds not that the proceeding before the notary public resulting in imprisonment of the witness for contempt affords due process of law, but that the privilege accorded to the witness on his initiative of subsequently instituting proceedings for discharge from imprisonment under Section 11514 suffices for due process of law under the Federal Constitution.

## 2. THE OHIO STATUTES AS CONSTRUED BY THE SUPREME COURT OF OHIO ARE IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

As hereinbefore demonstrated, the notary has no power or jurisdiction to hear and determine the guilt or innocence of a witness charged with contempt and whatever power he has is purely personal, absolute, despotic and arbitrary, exercised without any of the limitations of judicial process. Having no jurisdiction and being unable to pass upon the question of the guilt or innocence of the person appearing before him, he does not and cannot afford such person an opportunity to be heard on the charge against him. Notice as a requisite of due process imports an opportunity to defend, without which the notice is a mere sham and had better be omitted altogether. Thus the proceeding before the notary lacks the

three prime essentials of due process, namely, notice and opportunity to be heard, before a court or officer of competent jurisdiction, before condemnation.

The inquiry whether a witness has committed contempt of a notary, involves questions of law as well as of fact, since by statute the notary should punish only *an unlawful refusal*. The determination of that inquiry involves a judicial determination, which, in the language of Chief Justice Bigelow in *Denny vs. Mattoon & others*, 2 Allen (Mass.) 361, 380, 79 Am. Dec. 784 (1861), "is not to be settled arbitrarily or capriciously, but by the application of fixed rules and established principles to facts which may be proved. * * * it must be the result of due inquiry sufficient to satisfy the discretion and convince the judgment of the officer of the law, in whom the authority and jurisdiction to decide the question have been duly vested."

We do not find it necessary to maintain that a notary would be incompetent to receive a grant of judicial power from the legislature of Ohio. It is plain from the Ohio statutes and decisions that he has received no grant of such power. Neither do the principles we assert as to the requisites of due process of law touch upon the doctrine of distribution of governmental powers and functions among the legislative, executive and judicial departments. While we shall concede that the Federal Constitution imposes no necessity for maintaining the division of the powers of a state government into its separate branches, still the requirements of due process do not permit depriving one of his constitutional guarantee of a judicial hearing and determination of his personal right of liberty before some tribunal, whether an officer, board,

court or by whatever name called, authorized to hear and determine and proceeding to the exercise of the judicial power invested in it by the judicial process of notice, hearing and deliberation.

In proceeding to exercise the power of commitment, the notary has before him none of the pleadings in the action, and, except for any casual extra-official information he may fortuitously possess, he is altogether ignorant of the nature of the action and the issues made and the rights of the parties and is provided by law with none of the information necessary to determine the question upon which his jurisdiction impinges. He holds no hearing, receives no evidence, makes no record, determines no facts and applies no law, may proceed in the absence of the party charged, is not equipped and is incompetent by law to make any determination and makes none, proceeds to commit and imprison in an *ex parte* proceeding by personal fiat at the control solely of the adverse party. And the person against whom he proceeds must either submit to continued imprisonment or take upon himself the burden of instituting an independent proceeding for his discharge. The notary need not in fact, even reach any conclusion, uninformed as it would be, that the evidence demanded is relevant or material, or that the witness' refusal is unlawful, and in the *Bevan* case confessedly made no attempt to do so.

If, as intimated by the Supreme Court of Ohio (*Ex Parte Bevan*, Appendix A, pars. 32 to 37), the statutes impose on the notary a mandatory duty to commit whenever requested by counsel, then the notary is, in law as well as in fact, a mere puppet; and the real power of commitment is entrusted to private litigants, through their attorneys.

## A. Due Process Requires Notice And An Opportunity To Be Heard Before A Tribunal Empowered To Hear And Determine And Having Jurisdiction Of The Subject Matter

Due process of law requires notice and opportunity to be heard by a court having jurisdiction of the subject matter. *Pennoyer vs. Neff*, 95 U. S. 714, 732, 733 (1877); *Hurtado vs. California*, 110 U. S. 516, 535, 546 (1884); *Foster vs. Kansas*, 112 U. S. 201, 206 (1884); *Louisville Trust Co. vs. Comingor*, 184 U. S. 18 (1902); *Twining vs. New Jersey*, 211 U. S. 78, 110 (1908); *Coe vs. Armour Fertilizer Works*, 237 U. S. 413, 423-425 (1915).

In *Twining vs. New Jersey*, this Court said at pages 110 and 111:

> "* * * Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Pennoyer v. Neff*, 95 U. S. 714, 733; *Scott v. McNeal*, 154 U. S. 34; *Old Wayne Life Association v. McDonough*, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties. *Hovey v. Elliott*, 167 U. S. 409; *Roller v. Holly*, 176 U. S. 398; and see *Londoner v. Denver*, 210 U. S. 373."

Jurisdiction to pass upon the subject matter is essential for due process. *Pennoyer vs. Neff, supra* (95 U. S. 714), p. 733:

> "Whatever difficulty may be experienced in giving to those terms (due process of law) a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings ac-

> cording to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit.*" (Italics ours.)

Due process hears before it condemns and calls for "the deliberation and judgment of the court." *Hurtado vs. California, supra* (110 U. S. 516); *New Orleans Waterworks Co. vs. Louisiana,* 185 U. S. 336, 350 (1902).

In the case first cited, Mr. Justice Mathews said at page 535:

> "Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' * * *."

**B. Notice Imports An Opportunity To Defend, And A Denial Of The Benefit Of Notice Is In Effect A Denial Of Notice**

Reasonable opportunity to be heard is just as necessary as reasonable notice. *Londoner vs. Denver,* 210 U. S. 373, 386 (1908):

> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the

board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."

Notice imports an opportunity to defend. In *Hovey vs. Elliott,* 167 U. S. 409, 415 (1897), it was said:

> "But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. *A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether.* It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard." (Italics ours.)

## C. Appearance Before The Notary For Examination Will Not Authorize Commitment Without Notice Of The Charge Of Contempt And Opportunity To Defend

Appearance before the notary for examination will not authorize commitment for contempt without notice of the charge and opportunity to defend.

in *Hovey vs. Elliott, supra* (167 U. S. 409), it was held:

> "A court possessing plenary power to punish for contempt, unlimited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court."

This court said further (p. 417):

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

In the case of *In re Rosser*, 101 Fed. 562 (C. C. A., 8th, 1900), the defendant had been cited to appear for examination. He had no knowledge that the examination would be used to obtain an order respecting some of his

property. After the examination the referee, without notice to him and without giving him an opportunity to be heard, entered an order directing him to pay over certain money which he held. He refused and was committed to jail for contempt. The court said (p. 567):

> "* * * It (due process of law) must give him notice of the charge or claim against him and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him and of the relief sought from the court if the claim is sustained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws and cannot be sustained." (Citing cases.)

So, too, the notary has not the right to attach a person for contempt in refusing to appear before him and testify, when if he had appeared and refused to testify the notary could not have legally exercised the power.

### D. Provision For Relief After Imprisonment On The Void Order Of The Notary Does Not Afford Due Process

Ohio General Code Section 11514, which in terms provides for relief after commitment by the notary, can

not validate the void orders of the notary. Provision for relief after judgment or commitment is not sufficient to satisfy due process. *Coe vs. Armour Fertilizer Works, supra* (237 U. S. 413, 423, 424); *Pennoyer vs. Neff, supra* (95 U. S. 714, 728); *Meyers et al. vs. Shields,* 61 Fed. 713, 724 (C. C., N. D. Ohio, 1894). As suggested by the Circuit Court of Appeals for the Third Circuit in *Nottebaum et al. vs. Leckie et al.,* 31 Fed. (2d) 556, 561 (C. C. A. 3d, 1929), a vain attempt to undo a wrong of the kind here involved cannot be so coupled with the proceeding as to make lawful that which before was wholly unlawful.

In *Coe vs. Armour Fertilizer Works, supra* (237 U. S. 413), a Florida statute which provided in substance that after execution against a corporation had been returned "no property," an execution might issue against a stockholder for the same debt to be enforced against his property to the extent of his unpaid subscription as the same appeared on the books of the corporation without notice to such stockholder or other preliminary step, was held by this Court to be repugnant to the due process clause of the Fourteenth Amendment notwithstanding that the statute provided two independent remedies for relief against the execution if invalid; the one a stay of execution by proceedings before the sheriff upon the filing of an affidavit of illegality and giving bond; the other a stay upon motion by the court before which the execution was returnable.

The Supreme Court of Florida had held the statute to be constitutional, and had affirmed a judgment denying a motion to quash the execution, on the ground that Coe in fact had no defense, saying (opinion, p. 418), that

he did not "seek to interpose any of the defenses pointed out as open to him upon the former hearing, but stands boldly on his attack upon the constitutionality of the act, and by a proceeding unknown to our practice."

After reviewing the construction of the statute given by the Supreme Court of Florida, this Court said in holding the statute to be unconstitutional (pp. 422-424):

> "Thus construed, and as applied in this case, we think Sec. 2677 is repugnant to the 'due process of law' provision of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect.
>
> * * * * *
>
> "*The suggestion that because, under Secs.* 1624 *and* 1625, *a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues and before interference with his possession or his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not 'within the class who may justly complain' will not withstand critical analysis.* (Italics ours.)
>
> "The statute mentions no classes, and the state court merely distinguished between those who complain and those who do not. Against one and all, execution may be issued without notice or hearing; the judgment against the corporation, and the record of stockholdings and stock subscriptions found upon the books of the corporation, being treated as conclusive against those named as stockholders. If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or receiving it makes no objection, his property is taken in satisfaction of the cor-

poration's debt—manifestly without due process of law. But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. *To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown,* 19 Wall. 107, 123." (Italics ours.)

See also *In re Ziebold,* 23 Fed. 791 (C. C., D. Kan., 1885), where the court, in discussing the essentials of due process, said at page 793:

> "* * * Nor can a person be condemned without an opportunity to be heard and make his defense, although he may be guilty."

The want of jurisdiction by the notary is not cured by reason of the fact that the judge to whom application for discharge may be made after imprisonment may have jurisdiction to commit. *Pennoyer vs. Neff, supra* (95 U. S. 714, 728):

> "* * * Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when ren-

> dered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. * * * *The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.*"

The following quotation from *People ex rel. McDonald vs. Leubuscher et al.*, 54 N. Y. S. 869, 879, 34 App. Div. 577, 590 (1898), is apposite:

> "* * * It is idle to say that the power to commit one to prison under such circumstances does not directly touch the liberty of the person who is confined there by virtue of it. A power which can impose upon any citizen the necessity to give information about his most private affairs in a matter in which he is not at all concerned, at the peril of imprisonment if he refuses, certainly affects his liberty in an eminent degree. It will not do to say that he may relieve himself of the imprisonment by answering the question. Whenever one is committed for refusal to perform an act he can get free by doing it; but no court has ever suggested that fact as a reason for sustaining the commitment. The fact that he is compelled involuntarily to perform a certain act, or to subject himself to imprisonment necessarily affects his liberty. He is therefore entitled to the protection of that article of the constitution which prescribes that no man shall be deprived of his liberty without due process of law."

The arbitrary edict of the notary is immediately executed, and deprives the witness of his liberty for an indeterminate period without due process of law, unless he assumes the burden of seeking his discharge by affirmative action. Whatever right to a judicial hearing is

given by Ohio law, "It is not the right to appear and make defense (before a competent tribunal) when it is most valuable and efficient; it is a right to defend after judgment and conviction." *Meyers et al. vs. Shields, supra* (61 Fed. 713, 724). In *Callan vs. Wilson*, 127 U. S. 540, 555 (1888), this Court, in commenting upon laws which gave the defendant the right of trial by a jury in the appellate court "as if the case had originated therein," quoted with approval the following statement by Mr. Justice Blatchford in *In re Dana*, Fed. Cases No. 3,554, 7 Benedict 14:

> "* * * In my judgment, the accused is entitled, not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury."

In like manner it is not due process of law in this case for an incompetent officer first to convict and imprison the witness without notice or trial, and it does not become "due process" merely because the witness may subsequently secure his discharge by affirmative action on his part in an independent proceeding.

In *Meyers et al. vs. Shields, supra* (61 Fed. 713), it was held the grant of a right of review by court proceedings would not validate the determination of an officer which in itself was void for due process of law. The question was whether the county auditor was disqualified to make a valid assessment by placing omitted property on the duplicate list for taxation, because the statute gave him a fee of four per cent of the amount recovered.

The court held that the statute was unconstitutional and void under the Fourteenth Amendment, because of the direct pecuniary interest of the officer, and further,

because the entry was made on the tax duplicate without notice or trial; that "unless the taxpayer assumes the burden of removing the cloud upon his title and the lien upon his property by affirmative action, they stand as a menace to his credit and right of possession of his property * * *. This is not the right to appear and make defense at the time when it is most valuable and efficient. It is a right to defend after judgment and conviction" (p. 724).

### E. These Cases Are Not Within That Class Of Proceedings Where Due Process Permits Postponement Of Judicial Inquiry

The appellee cited below general statements to the effect that due process of law is not necessarily judicial process and argued inferentially that the right of judicial review might be postponed until after commitment without offense to the requirements of due process.

It is true that what is due process of law "varies with the subject matter and the necessities of the situation"; *Moyer vs. Peabody*, 212 U. S. 78, 84 (1909); that it does not in all cases mean proceedings in court; that there are exceptions to the requirement of notice and hearing by the administrative board or official to the party whose rights and liabilities are to be affected, and that in certain cases summary action without hearing before the particular board or official is authorized, and, in such cases the "mere postponement of judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips et al., Executors, vs. Commissioner*, 283 U. S. 589 (1931). See also *Murray*

*vs. Hoboken Land & Imp. Co.,* 18 How. (U. S.) 272 (1855); *Davidson vs. New Orleans,* 96 U. S. 97 (1877).

But these exceptions to the usual course of due process of law have no application to the instant proceedings. "Under ordinary circumstances due process of law implies a formal judicial proceeding." *Held vs. Crosthwaite et al.,* 260 Fed. 613, 625 (C. C. A. 2nd, 1919). Summary action without hearing, and postponement of judicial inquiry, constitute due process of law *only in the assertion of the rights of the public against the property of the individual in the exercise of the public police power or the imposition of burdens upon his property for the public use, where the nature of the subject matter requires summary action;* as in matters of taxation and revenue and in the exercise of the power of eminent domain, where it is essential that government needs be immediately satisfied; *Murray vs. Hoboken Land & Imp. Co., supra; Springer vs. United States,* 102 U. S. 586 (1880); and in the exercise of the public police power where public health or public safety require the immediate destruction of private property; *Phillips et al., Executors, vs. Commissioner, supra* (283 U. S. 589).

That the subject matter of these proceedings is not within the exceptional class where due process of law does not imply a formal judicial proceeding is evident from the authorities. Thus the headnote of *Davidson vs. New Orleans,* 96 U. S. 97 (1877), where the question concerned the taxing power, states:

> "The court has heretofore decided that due process of law does not in all cases require a resort to a court of justice *to assert the rights of the public against the individual, or to impose burdens upon his property for the public use.*" (Italics ours.)

*Phillips et al., Executors, vs. Commissioner, supra* (283, U. S. 589), states the application of this exception to the usual course of due process of law. There in upholding the provision of the Revenue Act authorizing summary enforcement of the liability of transferees of assets of a corporation, it was said (at pp. 596, 597):

> "*Where only property rights are involved,* mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. (Citations.) Delay in the judicial determination of property rights is not uncommon where it is essential that government needs be immediately satisfied. For the protection of public health, a state may order the summary destruction of property by administrative authorities without antecedent notice or hearing. (Citations.) Because of the public necessity, the property of citizens may be summarily seized in war-time. (Citations.) And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. (Citations.)" (Italics ours.)

If it is borne in mind that the question here considered concerns only the right of a party to cross examine his adversary in connection with the assertion of private claims by private persons, it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain or of taxation.

The cases upon which the appellee based his contentions that due process of law is not necessarily judicial process, concern the grant of judicial or *quasi*-judicial powers to administrative officials or bodies created by the legislature. They encompass the vast field of ad-

ministrative law. But the procedure of administrative agencies must satisfy the requirements of due process of law. By whomever the power is exercised, it must be exercised *in the manner prescribed by the law of the land.* Due process of law, in this respect, applies to all branches of government, and to all characters of public officers. *Davidson vs. New Orleans, supra* (96 U. S. 97, 107); *Noble vs. Union River Logging Railroad Co.,* 147 U. S. 165, 173 (1893).

The procedure must include notice and opportunity to be heard. In the case of *Chicago, Milwaukee and St. Paul Railway Co. vs. Minnesota,* 134 U. S. 418, 457 (1890), Mr. Justice Blatchford said in relation to the determination of an administrative body:

> "* * * No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; * * *."

See also *Federal Trade Com. vs. Curtis Pub. Co.,* 260 U. S. 568 (1923); *Kwock Jan Fat vs. White, as Commissioner,* 253 U. S. 454, 458 (1920); *New York, etc., Co. vs. McCall et al.,* 245 U. S. 345, 348-349 (1917); *Interstate Commerce Commission vs. Louisville and Nashville R. R. Co.,* 227 U. S. 88, 91 (1913); *Interstate Commerce Com. vs. Baltimore, etc., Co.,* 226 U. S. 14 (1912); *Tracy vs. Comm. of Internal Revenue,* 53 F. (2d) 575, 578 (C. C. A. 6th, 1931).

The principle here involved is admirably stated by Mr. Justice Field in *The Railroad Tax* cases, 13 Fed. 722, 752 (C. C., D. Cal., 1882) when he says:

"* * * But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established, by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

**F. Assuming That The Notary, Who Is An Administrative Or Executive Officer May Be Given The Power To Punish As For Contempt, Then The State Law Must At Least Provide Fair Opportunity For Submitting To The Determination Of A Court Upon Its Own Judgment As To Both The Facts And The Law Before Commitment, Fundamental Questions Involving The Jurisdiction Of The Notary And Claims of Deprivation Of Rights Guaranteed By The Federal Constitution**

A party asserting deprivation of rights secured by the Federal Constitution is deprived of due process of law if no fair opportunity is provided by state law for submitting the question to the determination of a judicial tribunal upon its own judgment as to both facts and law. *Ohio Valley Water Co. vs. Ben Avon Borough*, 253 U. S. 287 (1920); *Crowell vs. Benson*, 285 U. S. 22 (1932).

In applying the principle of the *Ben Avon* case and *Crowell vs. Benson, supra*, to the instant proceedings,

we do not broadly raise the question of the validity of the grant of judicial or *quasi*-judicial powers to administrative officers or tribunals. We would observe the distinction expressed in *Crowell vs. Benson, supra* (285 U. S. 22, 50-51), in considering the validity of Federal administrative determinations under the Federal Constitution:

> "As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. * * *
>
> "* * * The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined."

The usual case involving the validity of the grant of such power to an administrative officer or tribunal concerns the exercise of a public right or function, *e. g., Phillips et al., Executors, vs. Commissioner, supra* (283 U. S. 589); *Tracy vs. Comm. of Internal Revenue, supra* (53 F. (2d) 575); *Stanton vs. Tax Commission,* 114 O. S. 658 (1926), which are recent important pronouncements of these courts on administrative agencies. The present proceedings concern only the rights of private persons, the enforcement of the purported right of the adversary party to obtain evidence in advance of trial to support his private claim to property.

It is submitted that the power to commit in connection with the performance of the judicial functions of government is essentially the exercise of judicial power.

In view of the right of the witness called for examination to refuse to answer incompetent questions, the exercise of the power to commit for refusal to answer calls for a determination of the rights of the parties upon the facts and the law. That calls for a *judicial determination* and the exercise of judicial power.

Numerous decisions hold that the power to punish for contempt is the highest exercise of judicial power, and may not be conferred upon an inferior ministerial officer. *Interstate Commerce Commission vs. Brimson,* 154 U. S. 447 (1894); *Kilbourn vs. Thompson,* 103 U. S. 168 (1880); *In re Mason,* 43 Fed. 510 (D. C., Minn., 1890); *Burns vs. Superior Court,* 140 Calif. 1, 73 Pac. 597, 602 (1903); *Langenberg, Sheriff, vs. Decker,* 132 Ind. 600, 31 N. E. 190 (1892); *People ex rel. McDonald vs. Leubuscher, supra* (54 N. Y. S. 869, 34 App. Div. 577); *Ward Baking Co. et al. vs. Western Union Telegraph Co.,* 200 N. Y. S. 865, 205 App. Div. 723 (1923); *In re Sims,* 54 Kan. 152, 37 Pac. 135, 136 (1894); *In re Huron,* 58 Kan. 152, 48 Pac. 574, 575 (1897).

In *Interstate Commerce Commission vs. Brimson, supra* (154 U. S. 447), the headnote reads in part as follows:

> "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for *final* determination. Such a body could not, under our system of government, and *consistently with due process of law,* be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." (Italics ours.)

In speaking of the inability of the commission itself to compel a witness to answer or produce the books, papers, etc., the court said:

> "* * * Except in the particular instances enumerated in the Constitution, * * * *the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.*" (P. 485.) (Italics ours.)
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> * * * * *
>
> "* * * Of course, the question of punishing the defendants for contempt could not arise before the Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court." (Pp. 488, 489.)

In *Kilbourn vs. Thompson, supra* (103 U. S. 168), the court, in denying the power of Congress to impose a fine or imprisonment on a witness who refused to testify before that body, without the determination of a competent judicial tribunal, said:

> "* * * No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no 'person shall be deprived of life, liberty, or property, without due process of law,' the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. * * *." (P. 182.)

*In re Mason*, 43 Fed. 510 (D. C., Minn., 1890), held, following *Kilbourn vs. Thompson, supra*, that a commissioner of the circuit court had no power in the criminal proceeding before him to arrest a witness who refused to obey a subpoena. The court said (P. 515):

> "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record, or superior courts. * * * This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inferences and implications, but must be expressly conferred by law."

The court said also (P. 516):

> "It is stated that the commissioner had the authority to arrest the petitioner for the purpose of taking him before some court having authority to punish for contempt, and that he was about to do this. I can see no distinction between the power to decide that a contempt has been committed, and forthwith arrest the person, and the authority to punish. The arrest is for the purpose of punishment, and if the commissioner had no power to punish he could not deprive the petitioner of his liberty, however short the time might be."

The words "due process of law" have the same meaning in the Fifth and Fourteenth Amendments of the Federal Constitution. *Twining vs. New Jersey, supra* (211 U. S. 78, 100-101); *Hurtado vs. California, supra* (110 U. S. 516, 535).

In *In re Huron, supra* (58 Kan. 152, 48 Pac. 574), the court, in holding that a notary public had no power to commit a witness for contempt under statutes purporting

to confer that power upon him, aptly describes the anomalous situation of the notary under the law of Ohio:

> "* * * While the taking of testimony is incidental to a judicial proceeding, the notary, in taking the deposition, is not required to determine the relevancy and competency of testimony, but simply writes and authenticates the testimony given, with such objections as the parties desire to make. He is not designated as a court, nor clothed with the usual paraphernalia of such a tribunal. A court is said to be a tribunal organized for the public administration of justice at a time and place prescribed by law. No provision is made for pleadings, or the issuance of process by a notary, except to subpoena a witness to give his testimony. If the witness refuses to be sworn or to testify, and is deemed subject to a charge of contempt, no rules are prescribed for a trial before the notary, nor is specific provision made for obtaining evidence in order to determine whether such witness is actually guilty of contempt. Up to the time of the refusal of the witness, at least, the notary was only an executive officer, and was exercising executive power. There is no such thing as contempt of executive authority which is punishable. While an executive officer might be constituted a court, judicial power cannot be conferred on him as merely ancillary to the exercise of purely executive power." (Pp. 575, 576.)

The Ohio statutes as construed by the Supreme Court of that state present a strange anomaly in that a notary public, who has no "judicial power" but is a mere ministerial or executive officer, yet punishes summarily for contempt, which is generally said to be the highest exercise of judicial power. The discerning Common Pleas judge before whom the case of *In re Rauh, supra* (65 O. S. 128), was tried, while feeling himself

bound by the decisions of the Supreme Court of Ohio, observed in his opinion reported in 8 O. N. P. 142 (1901) at page 145:

> "Such an anomaly in our jurisprudence requires correction. Depositions under our law are a proper mode of testimony, and either the officer, to whom is delegated the power of taking them, ought to be well versed in the law, and have the power of passing upon the competency of the testimony, or the road to the opinion of a court upon such competency ought not to lead through a jail."

It is questioned whether under *Interstate Commerce Commission vs. Brimson, supra* (154 U. S. 447), and *Kilbourn vs. Thompson, supra* (103 U. S. 168), the inquiry whether a witness is bound to answer a particular question or to produce books or documents can be committed to the notary public for *final* determination even though the Ohio statutes had conferred upon the notary jurisdiction to determine the competency and relevancy of the same, but it is not necessary to decide that point in these proceedings. While the notary public in the taking of testimony performs a function which is incidental to a judicial proceeding, it can not be maintained and the Supreme Court of Ohio has not held that he does or can accord the witness that judicial hearing to which the latter is entitled by the Federal Constitution. He acts wholly independently of the court in which is pending the case in which the deposition is being taken. If he has any discretion at all to refuse the importunities of counsel desiring commitment, he acts as his will dictates, unhampered by the requirements of due process of law.

It must be concluded, therefore, that the statutes of

Ohio under which the notary acted in this case and the proceedings of the notary against the petitioners, are violative of the due process clause of the Federal Constitution in failing to provide for notice and opportunity to be heard before *a competent tribunal before commitment and imprisonment.*

### 3. THE OHIO STATUTES HERE INVOLVED, AND THEIR OPERATION IN THESE CASES, FURTHER VIOLATE THE REQUIREMENTS OF DUE PROCESS IN THAT THEY PURPORT TO PERMIT THE COMMITMENT AND IMPRISONMENT OF WITNESSES BY AN OFFICER DISQUALIFIED BY REASON OF HIS DIRECT, PERSONAL, SUBSTANTIAL PECUNIARY INTEREST IN THE TAKING AND PROLONGING OF THE DEPOSITIONS

We proceed, in discussing this contention, from the premise that under the theory of the Ohio statutes the notary has the power and discretion, personal and arbitrary though it be, to decide whether or not he will commit and imprison a witness as for an unlawful refusal to give evidence.

Of course if Ohio General Code Section 11512, relating to commitment, is a mandatory statute, which the Supreme Court of Ohio strongly intimates, without so holding, because "it is not necessary so to do in this case," then a notary is without even a personal, arbitrary discretion, but must follow the dictates of counsel even though he is personally convinced that the witness' refusal is lawful, and his presence and part in the proceed-

ings are mere formalities, "and the sham and deceptive proceeding had better be omitted altogether."

Under such a construction of the statute our present contention would have to be directed to the disqualification of counsel for one litigant to imprison the adverse litigant and witnesses without a hearing, rather than to the disqualification of the notary. A statute which would in terms vest in one private litigant, through his counsel, the power by personal fiat to commit and imprison his adversary or witnesses as for contempt upon refusal to give evidence, no matter how irrelevant it might be or how frivolous the alleged cause of action might appear, notwithstanding that the witness might lawfully refuse to testify upon immaterial or irrelevant matters, and relegating one so imprisoned to relief by *habeas corpus*, would be so plainly vicious and flagrantly violative of due process, that we apprehend little argument would be required to demonstrate its unconstitutionality.

Yet in operation, if not in legal theory, the statutes under consideration approach this result, and would seem to be subject to the same vice as the statutes declared to be unconstitutional in the cases of *In re Sims, supra* (54 Kan. 1, 37 Pac. 135), and *In re Ziebold, supra* (23 Fed. 791).

It is obvious that if the appellants had been compelled to subject themselves to the range of testimony indicated in the subpoena *duces tecum* and as might be ordinary in a case of this nature, the fees of the notary would amount to several hundreds of dollars with an upward range limited only by the amount of testimony he could compel them to give. Not only the goodwill of his employers, and the hope of future employment, but

also the notary's compensation in these cases depended upon his committing and imprisoning the witnesses as a means of coercing them to give evidence. He was disqualified by a direct, pecuniary, substantial, personal interest to exercise any power he might have to determine whether he would or would not commit the witnesses. It is true that he was assured of *some* compensation regardless of his rulings. A few folios might be taken and transcribed and a few dollars earned if he refused to order a witness to answer or refused to commit; but *substantial* compensation and the extent of it depended upon commitment of the witnesses.

As we have stated, he not only did comply with the request of his employers but he did it without arriving at any deliberate judgment of his own upon the legal question as to whether the evidence demanded was material upon which depended a determination as to whether the refusal was unlawful.

This was not an exceptional but the usual and normal operation of the statute in which the Supreme Court of Ohio found nothing repugnant to the statutory scheme.

Under the rule announced by this Court in *Tumey vs. State of Ohio*, 273 U. S. 510 (1927), the statutes of Ohio and their operation in the respects just noted denied due process of law to these appellants.

The *Tumey* case declared unconstitutional the statutes of Ohio concerning offenses against state prohibition laws which were triable without a jury before a mayor, who, when he convicted, but not otherwise, received his fee in costs and thus secured a substantial income. There the court said (P. 523):

"* * * But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in this case.

"The mayor of the Village of North College Hill, Ohio, had a direct, personal, pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional, but was the result of the normal operation of the law and the ordinance. * * *"

The rule of the *Tumey* case is applicable to a ministerial or administrative officer as well as to a court. *Meyers et al. vs. Shields, County Treasurer, supra* (61 Fed. 713). In that case the court held that the Ohio statute under which the auditor was charged with the duty of placing omitted property on the tax list, receiving a fee of four per cent of the delinquent taxes which he might thereby assess, denied due process of law and said (P. 725):

"The next important question to be determined is whether the auditor is disqualified to make a valid assessment as the conclusion of the proceedings before him because of his direct pecuniary interest in the result. If he makes a finding against the taxpayer and enters an assessment upon the tax duplicate, the statute gives him four per cent upon the amount so recovered. If he fails to discover any property omitted from the taxpayer's return, he receives no compensation for his services. Because of this direct reward if he finds against the taxpayer, and of no reward if he finds in his favor, is he disqualified, and are the pro-

> ceedings therefore invalid? The object of all legislation pertaining to judicial or *quasi*-judicial proceedings is to furnish an impartial and wholly disinterested tribunal before which such proceedings are instituted and carried forward. It is to carry out the constitutional guaranty that no man shall be deprived of life, liberty or property without due process of law that the chief safeguard of a disinterested judge, jury, referee or arbitrator is so carefully provided by legislation and protected by judicial scrutiny."

It would be a hypertechnical distinction that in the *Tumey* case the mayor would receive a fee only if he convicted. The difference in the cases of the mayor in the *Tumey* case receiving nothing or $12 of costs (page 523) and of the notary in this case faced with the choice of a negligible fee, or yielding to the temptation of the prospect of a substantial fee perhaps amounting to several hundreds of dollars and without upward limit if the witness could be coerced to testify by the exercise of the drastic power of summary imprisonment, shows the danger to be more perilous in the latter case.

It is the interest of the officer "in the controversy to be decided" (P. 522), his interest "in the resolving of the subject matter which he had to decide" (P. 524), which disqualifies him, however, and in what form the interest arises and regardless of the precise point to be decided so long as the motive of self-interest clashes with the right of the citizen to an impartial determination. No evidence need be introduced to show partiality or unfairness in fact. The vice is the existence of the motive to act in self-interest. Thus it was said in the *Tumey* case (P. 532):

> "* * * It is certainly not fair to each defendant, brought before the mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the mayor should weigh against his acquittal. * * *
>
> "* * * There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

The interest of the notary which influences him to make a decision against the witness is so direct and of such a substantial character that we are confident no parallel can be discovered. Employed by the examining party to take and transcribe testimony, he turns one folio over another, each bringing him 25c or double that amount, if both parties will require copies. Finally an impasse is reached, conflicting claims of right are asserted and he suddenly assumes the role of sole arbiter of a judicial controversy, wielding a power strange to his occupation and depending upon a choice of mere exercise of will, with no compulsion of duty to seek to make a just determination. His personal interest calls for a recognition of the fact that his true place is that of the servant and not the arbiter. Shall he act as directed by his employer and by ordering commitment coerce the giving of further evidence or shall he resist the dictates

of his employer and risk dismissal in the proceedings then going on and consequent loss of compensation, and also jeopardize his chance of future employment since he is hired by those who want answers and not by those who resist, and shall he make this self-sacrifice to no purpose since another notary more subservient than he may doubtless be found to do the bidding of the employer?

As was said in *Meyers et al. vs. Shields, supra* (61 Fed. 713) (P. 726), in regard to proceedings for the assessment of taxes where due process permits of more summary action:

> "* * * A statute which confers upon an officer, chosen solely with reference to other duties, the power to conduct a quasi-judicial proceeding, which in every stage of its progress is summary, and in its findings arbitrary in the highest degree, and which makes this officer, combining the functions of judge and jury, partial and biased, because directly interested by reason of the very liberal reward which flows to him if he decides against the taxpayer, is a gigantic and perilous stride towards withdrawing from the citizen every principle of constitutional protection heretofore deemed secure and perpetual. * * *"

The objection to the disqualification of a notary was raised in accordance with the state practice and in *In Re George Sage*, 24 O. C. C. (N.S.) 7 (1915), and was considered by the Supreme Court of Ohio and decided, adversely to our contentions, upon its merits.

## 4. THE OHIO STATUTES HERE INVOLVED AND THE OPERATION THEREOF, AS APPLIED TO THE FACTS IN THE BEVAN AND KOEHRMAN CASES, CONSTITUTE UNREASONABLE SEARCH AND SEIZURE AND DEPRIVE THESE APPELLANTS OF DUE PROCESS

As to the appellants Bevan and Koehrman, the subpoenas *duces tecum* served upon them were so broad and sweeping in their terms, and compliance with the order for the production of all the books, records and documents called for, and the forceful seizure thereof by the plaintiff for incorporation in the deposition and the consequent loss of possession thereof by the appellants for an indeterminable period until trial of the action, would be such a hardship and so burdensome and prejudicial and so unreasonable, as to constitute a deprivation of property without due process of law.

These subpoenas are set forth in the record (*Bevan*, 44; *Koehrman*, 43). A reading of them will disclose their all inclusive and unreasonable scope.

In *Hale vs. Henkel*, 201 U. S. 43, 76, 77 (1905), this Court said:

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to

protection. Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

"If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex Parte Brown*, 72 Missouri 83; *Shaftsbury vs. Arrowsmith*, 4 Ves. 66; *Lee vs. Angas*, L. R. 2 Eq. 59."

In *Consolidated Rendering Company vs. Vermont*, 207 U. S. 541 (1907), the question whether an unreasonable search and seizure of books and documents might not also be a deprivation of due process of law guaranteed under the Fourteenth Amendment was considered; this Court saying (P. 551):

> "Counsel insisted before us in discussing the second objection that the failure to give an opportunity to be heard why the books should not be produced deprived it of due process of law guaranteed under the Fourteenth Amendment. Without discussing the question whether this matter comes within the meaning of due process of law, we may say that the objection to the statute is not borne out by its text. * * * So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. *Simon v. Craft*, 182 U. S. 427; *Wilson v. Standefer*, 184 U. S. 399, 415; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 349."

But under the Ohio statutes the proceeding is to be, and in these cases it was, concluded and here imprisonment was imposed and was in effect, to enforce the production of the books and writings demanded before any hearing was or could be had.

See also *Crocker-Wheeler Co. vs. Bullock*, 134 F. 241 (C. C., S. D. Ohio, W. D., 1904).

While this Court held in *Weeks vs. United States*, 232 U. S. 383, 398 (1914), that the Fourth Amendment is not directed to the individual misconduct of state officers, this Court has not yet held that the guaranty of due process in the Fourteenth Amendment does not protect the citizen against unreasonable search and seizure at the

hands of the state, accompanied by a dispossession of the owner of the property seized, in this case, books, records and papers. If, therefore, the due process clause is held applicable it seems clear that the subpoenas and the operation of the statutes now in question, offend against its provisions.

## V.

## CONCLUSION

We submit that in the respects above pointed out Ohio General Code Sections 11510, 11511 and 11512, contravene and violate Section 1 of the Fourteenth Amendment to the Constitution of the United States; that they are unconstitutional and void, and that the judgment of the Supreme Court of Ohio in these cases should be reversed, and the discharge of the appellants from custody should be ordered.

Respectfully submitted,

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## APPENDIX A

Ex parte C. N. Bevan.
Ex parte John W. Koehrman.
Ex parte Robert A. Stranahan.

### SYLLABUS

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpoena.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

*Syllabus*

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpoenas *duces tecum*, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

(Nos. 23652, 23653 and 23654—Decided January 25, 1933.)

## STATEMENT OF THE CASE

Error to the Court of Appeals of Lucas County.

[1] These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases. An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

[2] These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error, C. N. Bevan, was held under a commitment issued by a notary public for his refusal to answer material questions, refusal to answer any further questions

of any character, and refusal to produce material books or records, pursuant to a subpoena *duces tecum,* in the course of the taking of his deposition in the suit of *Clara Sielcken-Schwarz v. The Woolson Spice Company et al.,* pending in the Common Pleas Court of Lucas county. The plaintiffs in error, John W. Koehrman and Robert A. Stranahan, had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpoenas personally served upon them.

[3] The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error, John W. Koehrman and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

[4] The petition charges that the defendants Koehrman and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his

last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in association with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants, taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

[5] The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

[6] The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

[7] On the same day the petition was filed, summons was duly issued and served upon all of the defend-

ants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the Common Pleas defendants and subpoenas *duces tecum* were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the Common Pleas plaintiff were served with a motion to quash the notice to take depositions and the subpoenas *duces tecum,* and to enjoin the taking of depositions. This motion came on for hearing before the Common Pleas Court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court an agreement was reached between counsel for the Common Pleas plaintiff and chief counsel for the Common Pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the Common Pleas defendants, subpoenas *duces tecum* upon the plaintiffs in error Bevan and Koehrman, and ordinary subpoenas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

[8] At 9:30 a.m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpoena. The witnesses, Koehrman and Stranahan, disregarded their subpoenas and failed to appear. On the failure of three of the witnesses summoned to appear and the failure of the witness, Bevan, to make any compliance with his subpoena *duces tecum,* the notary ad-

journed the hearing until 2:00 p.m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpoena. Prior to this adjourned time for the taking of these depositions, a supplemental motion to quash the new notices and subpoenas, and to enjoin the taking of depositions in the Common Pleas suit was filed in the Common Pleas Court. At 2:00 p.m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpoena *duces tecum*. Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpoena *duces tecum*.

[9] Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to

appear in obedience to their subpoenas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena as to give his testimony in the action."

[10] No arrests were made under the commitment or writs until 9:10 a.m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of *habeas corpus,* were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

[11] Thereupon counsel for the plaintiffs in error and common pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

[12] On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

[13] The original applications or petitions, and the amended applications or petitions, were heard by the

Court of Appeals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the Common Pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpoenas *duces tecum* called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpoenas.

[14] On June 22nd the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on June 29th these applications for stays were likewise overruled by that court.

[15] Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch, for plaintiffs in error.

[16] Messrs. Baker, Hostetler, Sidlo & Patterson, and Messrs. Fraser, Hiett, Wall & Effler, for defendant in error.

OPINION

[17] Stephenson, J. These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

[18] It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

[19] Stranahan was served with an ordinary subpoena and Bevan and Koehrman were served with subpoenas *duces tecum.*

[20] No complaint is made as to the service of the subpoenas. It is contended that the subpoenas *duces tecum* "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

[21] As bearing upon this particular phase of the case, *it is significant* that no question of privilege was raised.

[22] Stranahan and Koehrman disobeyed the order of their subpoenas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpoena *duces tecum,* giving as his reason therefor that he "was acting upon the advice of counsel," which, of itself, in a case

of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of *habeas corpus*, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. *Bevan v. Light, Sheriff*, (C. C. A.), 61 F. (2d), 1019.

[23] The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

[24] Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders, are attacked.

[25] The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the governor, on the certificate of the

common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to perform the duties of the office, or ascertain same by an examination prescribed by the rules of court.

[26] No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine" and undoubtedly with power to commit for contempt of his court.

[27] Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

[28] Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

[29] It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one

branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

[30] A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

[31] Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

[32] That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

[33] Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpoena or refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the pur-

pose of the statute? What did the Legislature intend that it should accomplish?

[34] The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

[35] The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

[36] Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. Notices are regularly served to take depositions of the officers of an adversary corporation. Subpoenas are regularly served. One officer appears in obedience to his subpoena, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

[37] The witness is given the right to have the assessment of his fine or his commitment inquired into

by a court of competent jurisdiction. Is the door of the law closed to the litigant?

[38] We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

[39] The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpoenas *duces tecum* did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

[40] The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

[41] In the absence of any question of privilege, we do not regard the scope of these subpoenas as unreasonably comprehensive, or that they constitute unlawful search and seizure.

[42] Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be

to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N.S.), 458, note; and 20 Ann. Cas., 96.

[43] Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpoenas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

[44] The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

[45] The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

[46] The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

[47] The review of the action of the notary in committing relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

[48] It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpoena, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: *DeCamp v. Archibald,* 50 Ohio St., 618, 35 N. E. 1056, 40 Am. St. Rep., 692; *Benckenstein v. Schott, Sheriff,* 92 Ohio St., 29, 110 N. E. 633.

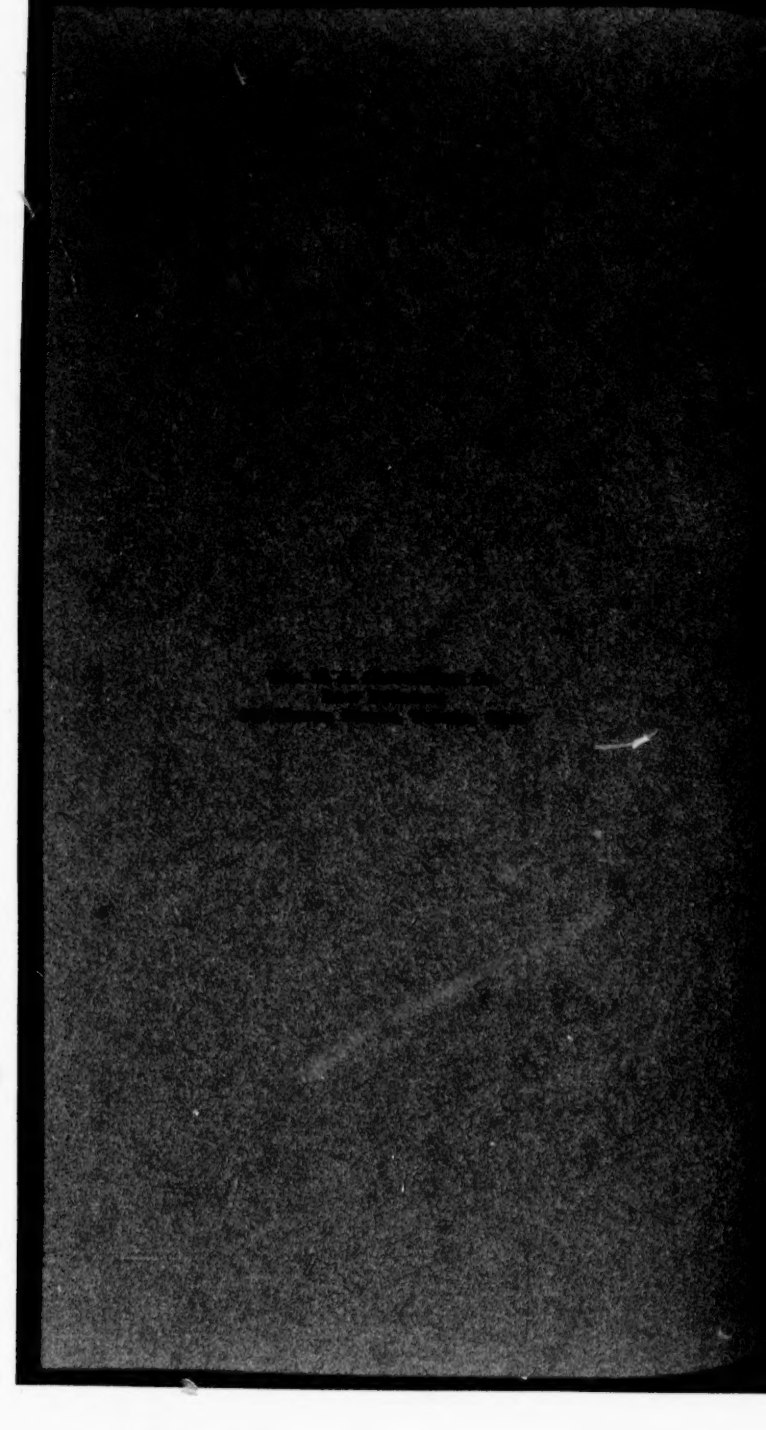
[49] These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

[50] We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C.J., and Kinkade, J., not participating.



In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 784

C. M. Burns,
*Appellant,*

vs.

David M. Kahrens, as Sheriff of Lucas County, Ohio,
*Appellee.*

No. 785

John W. Kohlhepp,
*Appellant,*

vs.

David M. Kahrens, as Sheriff of Lucas County, Ohio,
*Appellee.*

No. 786

Robert A. Strahahan,
*Appellant,*

vs.

David M. Kahrens, as Sheriff of Lucas County, Ohio,
*Appellee.*

Appeals from the Supreme Court of the State of Ohio.

# BRIEF IN BEHALF OF APPELLEE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Cleveland, Ohio,

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# In the Supreme Court of the United States

**OCTOBER TERM, 1932**

**No. 784**

C. N. BEVAN,
*Appellant,*

vs.

DAVID M. KRIEGER, as Sheriff of Lucas County, Ohio,
*Appellee.*

**No. 785**

JOHN W. KOEHRMAN,
*Appellant,*

vs.

DAVID M. KRIEGER, as Sheriff of Lucas County, Ohio,
*Appellee.*

**No. 786**

ROBERT A. STRANAHAN,
*Appellant,*

vs.

DAVID M. KRIEGER, as Sheriff of Lucas County, Ohio,
*Appellee.*

APPEALS FROM THE SUPREME COURT OF THE STATE OF OHIO.

## BRIEF IN BEHALF OF APPELLEE.

NEWTON D. BAKER,
Cleveland, Ohio,

HAROLD W. FRASER,
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# In the Supreme Court of the United States

**OCTOBER TERM, 1932**

**No. 784**

C. N. BEVAN,
*Appellant,*

vs.

DAVID M. KRIEGER, as Sheriff of Lucas County, Ohio,
*Appellee.*

**No. 785**

JOHN W. KOEHRMAN,
*Appellant,*

vs.

DAVID M. KRIEGER, as Sheriff of Lucas County, Ohio,
*Appellee.*

**No. 786**

ROBERT A. STRANAHAN,
*Appellant,*

vs.

DAVID M. KRIEGER, as Sheriff of Lucas County, Ohio,
*Appellee.*

APPEALS FROM THE SUPREME COURT OF THE STATE OF OHIO.

## BRIEF IN BEHALF OF APPELLEE.

### STATEMENT OF THE CASES.

The appellant Bevan appeals from a final judgment of the Supreme Court of Ohio, which held that the appellant had been lawfully committed as for contempt for his refusal to produce documents or to testify in obedience to the command of a subpoena personally served upon him.

The appellants Koehrman and Stranahan, respectively, appeal from final judgments of the Supreme Court of Ohio, which held that they were respectively lawfully attached to institute proceedings to determine whether their deliberate disregard of subpoenas personally served upon them constitutes contempt. While the technical legal forms in which these cases come before this Court involve on their faces merely the validity of such commitment and attachments, the practical question underlying these technical forms is whether these appellants, all of whom are citizens of Ohio, may be compelled to give their testimony by deposition in accordance with the statutes of that State to aid in the administration of civil justice. The practical question is not whether these appellants shall be imprisoned, but whether these appellants may avoid giving their testimony in a civil case pending in the State of Ohio.

While it seems immaterial, unless it be for one purpose hereinafter mentioned, none of the proceedings here under review is an action in *habeas corpus* under the Ohio statutes, the Ohio Constitution, or the common law, but they are severally applications for release from alleged unlawful imprisonment, pursuant to the statutory remedy conferred and created by Section 11514, Ohio General Code.

The material facts may be briefly stated. On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Herman Sielcken, filed her petition in the Common Pleas Court of Lucas County, Ohio, against The Woolson Spice Company, an Ohio corporation (of which appellant Bevan is Secretary and Treasurer), the appellants Koehrman and Stranahan and others. The petition charges that the defendants fraudulently conspired together to take advantage of the absence of Sielcken (President and controlling stockholder of the Woolson Company) in Germany, where he had gone on the business of the Company, and where he had been detained by his last ill-

ness and the exigencies of the World War, to oust Sielcken as President and wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter the defendants conspired together to acquire the stock formerly held by Sielcken and then held by his Estate for a grossly inadequate price; that the fraudulent conspiracy was carried on by the individual defendants, taking advantage of the control of the corporation wrongfully acquired by them and taking advantage of their position of trust and confidence, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the Executor and to all prospective purchasers of the stock and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by The Woolson Spice Company, obtained the stock of the Sielcken Estate for a grossly inadequate price. The conspiracy was carried on and consummated, while the plaintiff, widow of Sielcken, was still interned in Germany as an alien enemy. The petition asks to have the stock so obtained restored to the Estate, together with all dividends paid thereon since its fraudulent conversion. It is impossible to set forth the scope and ramifications of the fraudulent conspiracy and the fraudulent acts of the defendants in a brief compass and this can only be appreciated by an examination of the petition. (Bevan, 70-88; Koehrman, 48-66; Stranahan, 46-64.)*

The appellant Bevan was personally served with a subpoena *duces tecum* to appear before a notary public and give his testimony by deposition in the foregoing suit. (Bevan, 44-46.) Bevan appeared in response to his subpoena and was sworn but, *while making no claim of privi-*

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* Note: The three records are referred to by the respective names of the appellants.

*lege and while admitting that he knew what books and records were wanted and that they were under his control,* refused to produce any of the books or records described in his subpoena, though found by the examining magistrate to be material, and refused first to answer material questions, and then to answer any further questions of any character whatsoever, on his oral examination. Thereupon the notary adjudged that said questions were material, that said books and records were material and properly described and issued to the Sheriff of Lucas County a commitment directing him to arrest and commit the said witness to the County jail until he should submit to testify. (Bevan, 46-67.)

The appellant Koehrman was personally served with a subpoena *duces tecum* to appear before a notary public and give his testimony by deposition in the foregoing suit. (Koehrman, 43-44.) The appellant Stranahan was personally served with a simple subpoena to appear before a notary public and give his testimony in said suit. (Stranahan, 43.) Both Koehrman and Stranahan wholly disregarded their respective subpoenas and failed and refused to appear either at the time fixed by their subpoenas or at an adjournment of the taking of the depositions. Thereupon the notary issued writs of attachment for each of them commanding the Sheriff of Lucas County, Ohio, to attach and bring each of them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena as to give testimony in the action." (Koehrman, 45; Stranahan, 42.)

In issuing the commitment for the appellant Bevan and attachments for the appellants Koehrman and Stranahan, the notary public acted under the authority conferred upon him by Sections 11510, 11511, 11512 and 11529, Ohio General Code, printed at pp. 13-15 and in Appendix A hereof.

In reviewing the action of the notary public, the Ohio Courts acted under Section 11514, General Code of Ohio.

Thereafter each of the appellants by arrangement surrendered to the Sheriff of Lucas County in the Lucas County Court House and immediately filed their several applications under Section 11514, General Code of Ohio, for discharge from alleged illegal imprisonment. (Bevan, 37, 89; Koehrman, 36, 67; Stranahan, 36, 65.) The Court of Appeals of Lucas County, Ohio, forthwith admitted each of said appellants to bail upon their respective applications. (Bevan, 37; Koehrman, 36; Stranahan, 36.) The appellants Koehrman and Stranahan, by this untimely resort to the Court, thus prevented the Sheriff from bringing them before the notary public for hearing as to whether their disobedience of their respective subpoenas constituted contempt. The absence of this hearing so prevented by the appellants Stranahan and Koehrman is one of the grounds advanced for their release. It is from the foregoing commitment that the appellant Bevan and from the foregoing attachments that the appellants Koehrman and Stranahan seek release on these appeals.

After a full hearing, the Court of Appeals of Lucas County denied the respective applications of the appellants for release from alleged illegal imprisonment and remanded each of the appellants to the custody of the Sheriff. (Bevan, 39, 133-136; Koehrman, 38, 110-114; Stranahan, 38, 108-111.) Thereupon the appellants prosecuted separate proceedings in error to the Supreme Court of Ohio which heard the cases together and affirmed the lower court in each case.

During the interim between the judgments of the Lucas County Court of Appeals and the decision by the Ohio Supreme Court, the appellants attempted the collateral remedy of *habeas corpus* in the Federal Courts. Those collateral proceedings, which were disposed of by this Court

on December 12, 1932, by denial of the appellants' respective petitions for certiorari, are of course immaterial so far as these present appeals are concerned.

**The Statutory Scheme of Ohio Under Which it Was Sought to Take the Testimony of the Appellants and to Enforce Their Obedience to State Process.**

A brief analysis not only of the precise Sections of the Ohio Code here attacked, but of the auxiliary Sections of the Ohio Code embraced in the statutory scheme for taking testimony by deposition in civil cases in Ohio, will, we believe, serve to clarify the contentions urged upon this Court. All of the Sections of the Ohio Code hereinafter referred to are printed in full in Appendix A hereof.

Section 11521* provides that the testimony of witnesses may be taken in any civil proceeding by deposition or oral examination. Section 11526 provides that "either party may commence taking *testimony* by deposition at any time after service upon the defendant." Section 11534 requires that notice of the taking of deposition be given to the adverse party. Section 11535 prescribes the manner of notice and provides that the deposition shall only be used against such parties as shall have been given such notice. Section 11525 provides that such deposition shall not be used at the time of trial unless the witness is then absent, dead or infirm, or where the oral examination of the witness is not required. Section 11529 enumerates the officers authorized to take depositions and includes, among others, notaries public and judges. Sections 11502, 11503 and 11504 provide for the issuance form and service of subpoenas and subpoenas *duces tecum*. This, in brief, and

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* All statutes here referred to are Sections of the Ohio General Code.

and so far as deemed material, is the legislative scheme for the taking of testimony by deposition in civil cases in Ohio.

Sections 11510, 11511 and 11512 provide for the enforcement of this method of taking testimony in civil cases in Ohio. In passing it may be noted that these Sections also cover the compulsion of oral testimony in open court. Section 11510 defines contempt as (1) disobedience of a subpoena; (2) refusal to be sworn; and (3) unlawful refusal to answer as a witness. The Section also provides that any such disobedience "may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." The last two species of contempt are necessarily committed in the presence of the examining magistrate and the statute authorizes their punishment without further citation or hearing. The contempt defined as disobedience of a subpoena is not committed in the presence of the examining magistrate; and Section 11511 provides that if the witness has been *personally served*, the examining magistrate *may* issue an attachment to bring the intended witness before the magistrate to answer for his contempt as well as to give testimony, but provides that in the absence of personal service, the magistrate must proceed by rule to show cause against the defaulting witness. Section 11512 provides as punishment that the recalcitrant witness may be imprisoned "until he submits to be sworn, testifies or gives his deposition."

The statutory scheme of the State for taking testimony by deposition is completed by Section 11514 of the Ohio General Code, which provides that a witness committed for contempt for refusal to appear, to be sworn or to testify may immediately apply to any one of the Judges of any of the courts of record of the State who may discharge the witness "if it appears that his imprisonment is *illegal*." Section 11514 thus provides a judicial review of the legality of a commitment or an attachment of a witness. *Decamp*

*v. Archibald*, 50 O. S. 618 at 626 (Section 11514 of the Ohio General Code was formerly Section 5255 of the Revised Statutes of Ohio); *Benckenstein v. Schott*, 92 O. S. 29 at 41; and the decision below, *Ex Parte Bevan*, 126 O. S. 126, 184 N. E. 393, paragraph 3 of the syllabus. This judicial review is not a mere remedy by *habeas corpus*. Under the Ohio statutes, as at common law, the remedy of *habeas corpus* is limited to testing the *jurisdiction* of the committing authority. (Section 12165.) On the other hand, an application for release from imprisonment under Section 11514 tests not merely the jurisdiction of the committing magistrate but provides a full and free examination of the *legality* of the restraint without prejudice by reason of any action, finding or conclusion of the committing magistrate. It was under these statutes and this statutory scheme that the plaintiff in the Common Pleas suit sought to take the testimony of the appellants.

## QUESTIONS INVOLVED.

Although the appellants have filed a joint brief in this Court and severally seek the reversal of the respective judgments of the Ohio Supreme Court on the ground that Sections 11510, 11511 and 11512 are void as repugnant to the Fourteenth Amendment and that they have thereby been severally committed or attached without due process of law, an examination of their "Specification of the Assigned Errors Which are Intended to be Urged" (Appellants' Brief 6-11) discloses that the appellant, Stranahan, has in fact abandoned his appeal and the appellant, Koehrman, has limited his appeal to a single point, for the first four of the five assignments relied upon deal exclusively with the commitment of the appellant, Bevan, and the fifth assignment deals only with appellants, Bevan and Koehrman. Moreover, this appears to be conceded, for the appellants' arguments are addressed solely to the proceedings had be-

for the notary and the resulting writ of commitment for the appellant, Bevan, with the addition of a short argument concerning the subpoena *duces tecum* served on Koehrman.

The first three assignments (Appellants' Brief 6-9) challenge the above statutes on the ground that they confer an arbitrary power upon a notary to commit for contempts occurring in his presence and that they do not afford notice and an opportunity to be heard prior to the notary's adjudication of contempt and order of commitment. Clearly these assignments relate only to the case of Bevan who alone was adjudged to be in contempt by the notary and ordered to be committed. The fourth assignment (Appellants' Brief 10) relates to the alleged factual disqualification of the notary on account of an alleged pecuniary interest arising out of the fact that in the Bevan case the notary also acted as stenographer and was thereby entitled to compensation based on the amount of testimony taken. Necessarily this assignment is irrelevant as far as Koehrman and Stranahan are concerned, as it is based upon an alleged factual disqualification which did not then and may never apply to the proceedings had and to be had in the Koehrman and Stranahan matters. Obviously, it does not follow that because the notary acted as stenographer in the Bevan case, he will also act as stenographer when Koehrman and Stranahan give their testimony. The fifth assignment (Appellants' Brief 11) attacks the subpoenas *duces tecum* served upon Bevan and Koehrman on the ground that they constitute unreasonable searches and seizures. The result is that none of the assignments specified are relevant to the case of the appellant, Stranahan, and that so far as he is concerned the judgment below stands confessed and that the appellant, Koehrman, bases his appeal from the judgment of the Ohio Supreme Court solely upon the fifth assignment specified.

However, the joint contentions of the appellants may be summarized as follows:

*First*, Sections 11510, 11511, 11512 and 11514, Ohio General Code, are unconstitutional as denying due process of law under the Federal Constitution because,—

(a) They fail to provide for notice and opportunity to be heard according to their terms; and

(b) A Notary Public in any event is without jurisdiction to exercise the power to hear and determine conferred by these statutes under the decisions of the Supreme Court of Ohio and under the Fourteenth Amendment of the Federal Constitution; and

(c) The right to a judicial review afforded by section 11514 does not aid the allegedly invalid procedure provided by sections 11510, 11511 and 11512.

*Second*, The procedure actually followed constituted a denial of due process of law because,—

(a) There was in fact in the case of Bevan, no notice and opportunity to be heard; and

(b) The Notary Public was constitutionally disqualified by interest to act.

*Third*, In the cases of Koehrman and Bevan, the subpoenas *duces tecum*, as unreasonable searches and seizures, contravened the due process clause of the Fourteenth Amendment of the Federal Constitution.

Some of these contentions are not open to any of the appellants on these appeals. None of them is meritorious.

## ARGUMENT.

### I.

### THE JURISDICTION OF THIS COURT ON THESE APPEALS IS LIMITED TO A SCRUTINY OF THE CONSTITUTIONALITY OF OHIO GENERAL CODE SECTIONS 11510, 11511, 11512 AND 11514.

In addition to the questions relating to the constitutionality of certain sections of the Ohio General Code the appellants make three contentions, going solely to the actual proceedings had under the statutes which are attacked, and to certain procedure based upon and authorized by other sections of the Ohio General Code of which the constitutionality is not questioned. These three contentions are as follows:

(a) That the appellant, Bevan, was in fact deprived by the notary of notice and an opportunity to be heard.

(b) That the notary authorized by Section 11529 to preside at the taking of depositions, and by Section 11537 to transcribe the testimony, and by Sections 127 and 1746-2 to receive compensation therefor, was by these facts disqualified on account of pecuniary interest.

(c) That the subpoenas *duces tecum* served upon the appellants Bevan and Koehrman, were in fact so broad as to constitute an unreasonable search and seizure.

While none of these contentions is tenable, they are not open to the appellants on these appeals. Sections 11529, 11537, 127 and 1746-2 were not questioned by the appellants during any stage of these proceedings in the Ohio courts and they have not been included in their "Specification of the Assigned Errors which are Intended to be Urged." (Appellants' Brief 6-11.) It is clearly too late to attack these statutes now (*Hulbert v. Chicago*, 202 U. S. 275, 280) and since the claim of the disqualification of the notary arises directly out of these unchallenged statutes the appel-

lants are not entitled to urge the second of the foregoing contentions.

Moreover, since each of the three claims mentioned above relate to the deprivation of constitutional privileges and immunities, rather than to a direct attack on the statutes specified by the appellants, these claims are not of the character which will be entertained by this Court on appeal. *Judicial Code*, Sec. 237, 28 *U. S. C. A.* 344; *Zucht v. King*, 260 U. S. 174. Thus in the latter case it was stated by Mr. Justice Brandeis at page 177:

> "The bill contains also averments to the effect that in administering the ordinance the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal v. Delaware*, 103 U. S. 370. But the question is not of that character which entitles a litigant to a review by this Court on writ of error. The question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials. Compare *Taylor v. Taft*, 203 U. S. 461; *Champion Lumber Co. v. Fisher*, 227 U. S. 445; *Yazoo & Mississippi Valley R. R. Co. v. Clarksdale*, 257 U. S. 10, 16. This charge is of an unconstitutional exercise of authority under an ordinance which is valid. Compare *Stadelman v. Miner*, 246 U. S. 544. Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this Court only on petition for a writ of certiorari.
>
> "*Writ of error dismissed.*"

It is therefore submitted that the appellants should be precluded from asserting any claims other than their contentions that Sections 11510, 11511, 11512 and 11514 are, according to their terms, repugnant to the Fourteenth Amendment.

## II.

**SECTIONS 11510, 11511, 11512 AND 11514, OHIO GENERAL CODE, AFFORD NOTICE AND OPPORTUNITY TO BE HEARD WITH A FULL, FREE AND UNTRAMMELED REVIEW AND SATISFY EVERY REQUIREMENT OF DUE PROCESS OF LAW; AND THE POWERS BY SUCH STATUTES CONFERRED UPON AN OFFICER BEFORE WHOM DEPOSITIONS MAY BE TAKEN PURSUANT TO SECTION 11529, OHIO GENERAL CODE, MAY BE CONSTITUTIONALLY EXERCISED BY A NOTARY.**

It is not entirely clear whether the appellants contend that the statutes under which Bevan was committed and Kochrman and Stranahan were attached are unconstitutional for lack of any provision for notice and opportunity to be heard regardless of the character of the magistrate before whom the depositions are to be taken and by whom the power of commitment or attachment under such statutes is exercised, or whether appellants concede the constitutionality of such statutes and the adequacy of their provision for notice and opportunity to be heard but contest the constitutionality of any commitment or attachment by a notary public, pursuant to such statutes, not because of any inadequacy of the procedure, notice and hearing provided by such statutes but because, as claimed by the appellants, a notary public in Ohio has not the jurisdiction or authority to exercise the power conferred by such statutes upon the officer before whom a deposition is taken. Section 11529, which designates the various officers before whom depositions may be taken and who may therefore exercise the powers of commitment and attachment under the statutes attacked, reads:

> "*Officers authorized to take depositions.* Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, *notary*

*public*, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission."

Clearly it will facilitate an orderly and accurate examination of the soundness of the contention of appellants to determine first, whether the statutes attacked are unconstitutional according to their terms for lack of provision for notice and opportunity to be heard, and second, if the first inquiry be answered in the negative, whether they are unconstitutional as applied to notaries because notaries are without jurisdiction to afford the notice and opportunity to be heard provided by such statutes.

## A.

## It Is Clear that Sections 11510, 11511 and 11512, Ohio General Code, Are Not Unconstitutional According to their Terms for Lack of Provision for Notice and Opportunity to be Heard.

The pertinent Sections of the General Code of Ohio read:

"Section 11510. *Disobedience of a subpoena*, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a *witness* or to subscribe a deposition, may be punished *as a contempt* of the court or officer by whom the attendance or testimony of the witness is required."

"Section 11511. When a witness fails to obey a subpoena *personally served*, the court or officer, before whom his attendance is required, *may* issue to the sheriff, coroner, or a constable of the county, *an attachment*, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony, and *answer for the contempt*. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his ap-

pearance, which sum shall be endorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness *was not personally served,* the court, *by a rule,* may order him to show cause why an attachment should not issue against him."

"Section 11512. *Punishment for contempt.* Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition." (Italics ours.)

Section 11510 provides that (1) Disobedience of a subpoena, (2) Refusal to be sworn, and (3) Unlawful refusal to answer as a witness may be punished as a contempt. It is obvious that a contempt for refusal to be sworn or for unlawful refusal to answer as a witness must be committed in the presence of the officer before whom the deposition is taken. It is elementary law that where a contempt is committed in the presence of the court or magistrate empowered to punish therefor, no further citation or hearing is necessary. *Ex parte Terry,* 128 U. S. 289, 306; *McGrain v. Daugherty,* 273 U. S. 135, 157; *Blankenburg v. Commonwealth of Massachusetts,* 272 Mass. 25, 172 N. E. 209; *Middlebrook v. State,* 43 Conn. 257; *In re Willis,* 94 Wash. 180, 162 Pac. 38.

In *McGrain v. Daugherty,* 273 U. S. 135, Mr. Justice Van Devanter at page 157 stated the rule as follows:

"This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowl-

edge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served."

In *Blankenburg v. Commonwealth of Massachusetts*, 272 Mass. 25, 172 N. E. 209, 73 A. L. R. 808 at page 814 (A. L. R. citation), Chief Justice Rugg said:

"The plaintiff in error further contends that her arrest was illegal since no warrant or other process issued or was served upon her. The contempt here in issue and already described was direct. It was committed in the very presence of the court. In these circumstances no warrant was necessary. The arrest rightly might be made upon the oral direction of the presiding judge. It was said by Knowlton, *C.J.*, in *Hurley v. Commonwealth*, 188 Mass. 443, at page 446, 74 N. E. 677, 679, 3 Ann. Cas. 757: 'If a contempt is committed in the presence of the judge, no complaint or process is necessary to give the court jurisdiction of the offender, but the court may act upon its judicial knowledge, and the contemnor may be taken into custody at once.' *This method of procedure is not denial of due process of law but in strict accordance with every principle of due process of law. In re Terry*, 128 U. S. 289, 313, 9 S. Ct. 77, 32 L. Ed. 405; *McGrain vs. Daugherty*, 273 U. S. 135, 157, 158, 47 S. Ct. 319, 71 L. Ed. 580, 50 A. L. R. 1; *Middlebrook v. State*, 43 Conn. 257, 268, 269, 21 Am. Rep. 650; *In re Willis*, 94 Wash. 180, 162 P. 38." (Italics ours.)

Nor can any relevant distinction be drawn between the power of a judge to punish for a contempt committed in his presence without further notice or opportunity to be heard, which power may be either inherent or statutory, and the coinciding power of a notary public or other administrative officer, which is concededly statutory and not inherent. It must be obvious that the question of whether a court or magistrate has the power to commit for contempt, either inherent or by statute, is quite a different

question from whether the manner of exercising the power satisfies the requirements of due process of law. It is true that a court independently of statute ordinarily has the inherent power to commit for contempt. But that does not mean that a court can validly deny due process of law in the exercise of that power. It is obvious that it can not. In the determination of whether the commitment of a witness for contempt committed in the face of the committing power without further notice or opportunity to be heard constitutes due process of law, it is immaterial whether the authority of the committing power so to punish for contempt rests upon a valid statute or is inherent. Appellants, therefore, cannot distinguish, as they sought to do below, any of the cases cited on the ground that courts have inherent power to punish for contempt and hence the elements of due process are not involved. The cases hereinbefore cited conclusively establish that if a court or magistrate has power to commit for contempt, it is due process to commit one who has perpetrated a contempt in the face of the committing authority without further notice or opportunity to be heard. It is, therefore, clear that insofar as this statute authorizes a court or officer before whom depositions are being taken to commit a witness for refusal to be sworn or refusal to testify which, if unlawful, must constitute contempts committed in the face of the magistrate, without further notice or opportunity to be heard, it is "in strict accordance with every principle of due process of law." *Blankenburg v. Commonwealth of Massachusetts, supra.*

On the other hand, it is equally clear that disobedience of a subpoena (the other species of contempt described in Section 11510) is not committed in the presence of the court or magistrate. We therefore find that Section 11511 provides that on failure of a witness to obey a subpoena *personally served*, the court or magistrate *may* issue an

*attachment* commanding the officer to bring the recalcitrant witness before him to *answer for the contempt.* This is in strict accordance with every requirement of due process of law.

Where the contempt is not committed in the presence of the court or magistrate, it is well settled that the proceedings to punish for contempt may be initiated either by rule or order to show cause or by attachment. *In re Steiner,* 195 Fed. 299, 302. Issuance of such an attachment and arrest thereunder is not as a punishment for contempt but for the purpose of initiating the proceedings and bringing the person before the court or magistrate to answer for the alleged contempt. This provides for notice and hearing. Where the evidence of the contempt is before the court, such as where the return shows the personal service of a subpoena upon an intended witness, an attachment may lawfully issue without affidavit but on the court's own knowledge of the default; and such a procedure constitutes due process of law. As stated by Mr. Justice Van Devanter in *McGrain v. Daugherty, supra,* at page 157:

> "* * * they (court or committing authority) may issue attachments, based on their own knowledge of the default where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served."

Personal service of a subpoena is the appropriate and customary form of notifying a citizen that he is required to appear and testify. *Blackmer v. United States,* 284 U. S. 421 at 438.

In *Wilson v. State,* 57 Ind. 71, the court stated the rule as follows at page 73:

> "The return of the sheriff in this case supplied the place of an affidavit, and, we think, laid a sufficient foundation for either a rule or an attachment."

Both that proceedings to punish for contempt may be begun by attachment and that, in cases such as disobedience of subpoena personally served, the attachment may be issued without affidavit or other showing before the court is stated in 13 *C. J.* 68-9, §93, where it is said in part:

> "Before a person can be found guilty of a contempt *not committed in the presence of the court* he must have due and reasonable notice of the proceeding. A rule to show cause, *an attachment*, or other process should issue. The notice usually given is by the issuance of an order on him to show cause why an attachment should not issue, and the court may order the rule to show cause to be renewed, where the original could not be served in time, or where its recitals are defective. In some cases, however, an attachment may issue in the first instance without the granting of an order to show cause, as where all the evidence is before the court and the offense is clear, * * * or *against a defaulting witness who has been duly subpoenaed*, * * *. Under the practice and statutory provisions in some jurisdictions proceedings for contempt of court may be begun by warrant of attachment as well as by rule to show cause." (Italics ours.)

Such an attachment is really for the purpose of enforcing an order to appear; and it is appropriately issued after personal service of subpoena and without further notice to enforce the order embodied in the subpoena. See *Ex parte Merrill*, 245 Fed. 778, 780-1. Hence, Section 11511 properly and in strict compliance with every requirement of due process of law provides for the institution of contempt proceedings against an intended witness who has failed to obey a subpoena personally served without further notice or showing. On the other hand, Section 11511 provides that when a witness has not been personally served, the magistrate shall not issue an attachment without by rule ordering the intended witness "to show cause why an attachment should not issue against him." It is thus apparent that the Ohio statutes have been drawn with intelli-

gence and discrimination and fully comply with every requirement of due process of law. Where the contempt is committed in the face of the court or the examining magistrate, commitment for the contempt *may* follow without further notice or hearing. Where the return of the officer shows that a witness has disregarded a subpoena personally served, proceedings to punish for contempt *may* be commenced by an attachment issued on such showing on the records of the court or magistrate. When it does not appear that the absent witness has been personally served, no attachment may be issued except on order to show cause issued to and served upon the absent witness.

We are here dealing with the question whether under the statutes of Ohio there is a defect in due process arising from absence of notice and opportunity to be heard. We are not at the moment concerned with a different question of whether there is a defect in due process because the notice and opportunity to be heard is before a court or magistrate without jurisdiction. If, as the appellee submits, the statutes constitutionally authorize commitment for a contempt committed in the presence of the examining magistrate without further notice and opportunity to be heard, as in the case of the appellant Bevan, and constitutionally authorize the issuance of an attachment upon the return of an officer showing that the subpoena was personally served and thereby to institute a proceeding to bring the witness before the magistrate for hearing to "answer for the contempt," as in the cases of the appellants, Koehrman and Stranahan, then these appellants can found no right to release upon a claim that the statutes provide no notice or opportunity to be heard; and they are in this aspect of the matter remitted solely to the contention that the magistrate before whom the notice and hearing is provided is without jurisdiction or that the statutes violate due process of law in some respect other than denial of notice or hearing.

## B.

**A Notary Public Proceeding Under Sections 11510, 11511 and 11512 Pursuant to the Provisions of Section 11529, is Not Without Jurisdiction Under the Decisions of the Supreme Court of Ohio or Under the Fourteenth Amendment to Exercise the Power to Hear and Determine Conferred Upon Examining Officers Before Whom Depositions Are Taken Under Sections 11510, 11511 and 11512.**

The appellants argue that even though the Ohio statutes provide for notice and hearing and satisfy every requirement of due process of law, there is nevertheless an unconstitutional denial of due process whenever these statutory powers are exercised by a notary, for the reason, as they erroneously contend, that a notary in Ohio is without jurisdiction to exercise such powers. To sustain that conclusion, it would be necessary to find that under the statutes a notary exercises no discretion as to whether he will commit a witness for contempt for refusal to answer, or issue an attachment for failure to appear. It is at once apparent that this is in the teeth of the plain language of the statutes. Section 11510 and Section 11511 provide that a notary "*may*" punish for contempt and "*may*" issue an attachment. Clearly, a determination of both issues is committed to the discretion of the notary by the statutes, and, obviously, he is granted the power to exercise that discretion. It is absurd to contend that a statute gives an officer power to commit for contempts, as in such statutes defined, but withholds from the officer the power to consider and determine whether a contempt, as defined by such statutes, has been committed. The decisions of the Supreme Court of Ohio lead to no such absurdity.

1.

**The decisions of the Supreme Court of Ohio cannot be construed to deprive a Notary Public, acting as an examining magistrate, of the power, clearly conferred by the deposition statutes, to hear and determine whether a contempt, as defined in such statutes, has been committed.**

In the face of the clear and unambiguous language of the statutes, the appellants have taken the six decisions of the Ohio Supreme Court (*DeCamp v. Archibald*, 50 O. S. 618; *Ex Parte Jennings*, 60 O. S. 319; *In re Rauh*, 65 O. S. 128; *Ex Parte Schoepf*, 74 O. S. 1; *Benckenstein v. Schott*, 92 O. S. 29, and the decision below, *Ex Parte Bevan*, 126 O. S. 126) dealing with these sections of the Ohio General Code and by extracting a paragraph from one and a phrase from another, have attempted to build up an argument for their contention that a notary public is without jurisdiction to exercise the power to hear and determine whether a contempt has been committed and that his judgment of commitment is the exercise of an arbitrary and summary power to commit for any disobedience justified or unjustified. (Appellants' Brief 14-28.) Appellants' contention is based upon the following propositions:

> "1. Sections 11497 and 11503 authorize the compulsion from a witness called for examination by deposition before a notary public, of only such evidence as is competent and relevant * * *." (Appellants' Brief 15.)
>
> "2. * * * a witness called for examination before a notary public under Section 11497 may lawfully refuse to answer a question or to produce a document or writing that is incompetent or irrelevant, and his refusal to obey the order of the notary public constitutes a contempt for 'an unlawful refusal to answer' within the meaning of Section 11510 only if the order

calls for the production of evidence that is competent and relevant." (Appellants' Brief 16.)

With these two propositions the appellee does not quarrel and it is conceded that they substantially state the law of Ohio as it now exists. However, the appellants continue their statement of propositions as follows:

> "3. * * * the notary public has no power to hear and determine the question of the competency or relevancy of the evidence sought to be elicited, in connection with and as determinative of, the question whether the witness has committed the offense of contempt as defined by statute." (Appellants' Brief 16.)
>
> "4. If the witness refuses to answer upon the ground that the answer is incompetent or irrelevant he does so at his own peril, for the notary public may summarily commit him for contempt, if indeed it is not the duty of the notary public so to do upon the request of the adverse party, without affording an opportunity for hearing on, and without making any determination of, and without power in the notary public at any time, or in any judicial tribunal before imprisonment of the witness, to hear and determine, the question whether the evidence demanded is competent and relevant and whether the witness has committed the offense charged." (Appellants' Brief 16.)

The statements set forth in propositions numbered three and four cannot be found in any decision of the Ohio Supreme Court. The repeated assertion of the appellants that under the decisions of the Supreme Court of Ohio a notary public is without jurisdiction to hear and determine whether a contempt, as defined in the deposition statutes, has been committed, rests upon an attempted perversion of selected excerpts from the language of the Supreme Court of Ohio in certain cases holding that the exercise of such power by a notary public does not contravene Article IV, Section 1 of the Ohio Constitution relative to the distribution of judicial power. The only attacks heretofore made

upon the system of taking depositions in Ohio, during the more than one hundred years of its existence, have been upon the basis that the deposition statutes, *by conferring the power to hear and determine these questions upon a notary public,* contravened the State Constitution.

The question presented by these attacks was not what constitutes judicial power in an abstract, academic or theoretical sense, but what was meant by "judicial power" as used by the people of Ohio in their Constitution when they vested all judicial power in the courts. The Supreme Court of Ohio answered that question by an examination and consideration of the public understanding of the phrase and the usages and customs of the State at the date when the State Constitution was adopted. It held that while the term "judicial power" as used in the State Constitution is comprehended by and falls within the power to hear and determine, it is much more limited in scope and does not exhaust that power. It pointed out that an officer presiding over the taking of depositions, whether a notary public or judge (and he may be either under Section 11529), does not have power to pass upon an objection to the relevancy or competency of the evidence when interposed by a party to the action in which the deposition is taken, or to pass upon whether the evidence taken on the deposition shall be admissible as between the parties to the action on the trial of the cause, that determination being reserved for the judge presiding over the trial. It held, however, that an officer presiding over the taking of depositions, whether a notary or judge, has power to hear and determine *in relation to the rights of the witness* whether the witness may be lawfully required to testify or answer and whether a contempt, as defined in the deposition statutes, has been omitted. It held this power to hear and determine not to be embraced within the definition of "judicial power" as used in the Ohio Constitution and for that reason the depo-

sition statutes have been held immune to attack upon the ground that they conferred judicial power upon officers other than courts in contravention of the State Constitution. Whether the State court thus correctly interpreted the State Constitution presents no Federal question. *Carfer, Sheriff v. Caldwell,* 200 U. S. 293, 297. However, it is in that sense that ever since the decision of *DeCamp v. Archibald,* 50 O. S. 618, 625, in 1893, the language that a notary or other officer presiding over the taking of depositions does not exercise judicial power has been used and understood in the jurisprudence of Ohio. Such language has been used in that sense whenever the attack has been renewed or when the court has had occasion to make passing reference to the principle in cases where it was not directly involved.

Thus, notwithstanding the previous decisions of the Supreme Court of Ohio, the appellants in these cases in the State courts vigorously renewed the contention that the deposition statutes of Ohio are unconstitutional as in contravention of the Ohio Constitution because they confer upon notaries public and officers other than courts the power to hear and determine whether a contempt, as defined in the deposition statutes, has been committed. It was in answer to this contention and *vis-a-vis* the State Constitution that the Supreme Court of Ohio in these cases said in its syllabus that judicial power is not exercised by a notary public, pursuant to the deposition statutes, in committing to jail witnesses who refuse to answer questions and in attaching and committing to jail witnesses who disobey the order of their subpoenas.

It is therefore manifest, as will hereinafter more clearly appear from a critical examination of the cases, that the bald assertion of the appellants of lack of power in the notary public to hear and determine is not only unsupported by but in contradiction of the well settled law

of Ohio as interpreted by the State Supreme Court and the whole argument of the appellants upon this point falls to the ground.

It is the law of Ohio that the syllabus prepared by the entire court states the law of the case rather than the opinion which may or may not indicate the views entertained by the concurring majority. *Rule of Practice VI of the Ohio Supreme Court*, 122 O. S. lxviii; *State ex rel., v. Edmondson*, 89 O. S. 93 at 107. We shall, therefore, first consider the syllabi of the six decisions of the Ohio Supreme Court discussed at length by the appellants.

In *DeCamp v. Archibald*, 50 O. S. 618 (1893), the syllabus reads:

> "1. The power of a notary public in taking depositions to punish a contumacious witness, is not limited by section 119, Revised Statutes (Ohio General Code 126), to the powers in that regard conferred on justices of the peace by sections 6541 and 6542, Revised Statutes. (Ohio General Code 10318, 10319.) By being included in section 5269, Revised Statutes (Ohio General Code 11529), he has the further power of imprisoning for contempt, conferred on 'an officer' taking depositions, by sections 5252 and 5254, Revised Statutes. (Ohio General Code 11510, 11512.)
>
> "2. The power conferred by sections 5252 and 5254, Revised Statutes (Ohio General Code 11510, 11512), on a notary, or other officer, in taking depositions, to commit a witness to the jail of the county for refusing to answer a question, is not judicial *in the sense of the constitution*, conferring all judicial power upon the courts of the state.
>
> "3. Where the question propounded involves no question of privilege on the part of the witness, it is his duty to answer, if ordered by the notary to do so. The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken; and if he refuses to do

so, when ordered, he may be committed as a contumacious witness." (Italics ours.)

By this decision it was settled that the grant to officers other than courts of power to hear and determine whether a contempt, as defined in the deposition statutes, has been committed is not void as in contravention of the Ohio Constitution. The *ratio decidendi* of this decision and the subsequent decision of *Benckenstein v. Schott*, 92 O. S. 29, hereinafter discussed, is that the notary *in exercising the power to hear and determine* whether a witness shall be committed as for contempt for failure to appear or refusal to answer is not the kind of power to hear and determine which is vested exclusively in the courts by the grant of judicial power in Article IV, Section 1 of the Ohio Constitution. If no power to hear or determine exists, obviously no question of the exercise of judicial power in contravention of the State Constitution could be presented for determination. That the Supreme Court of Ohio has twice found it necessary to differentiate the power of a notary to hear and determine from the judicial power to hear and determine granted exclusively to the Ohio courts, is a complete answer to the claim of the appellants that such power to hear and determine does not exist. In fact this decision expressly holds that a notary has power to hear and determine but that it is not the kind of power to hear and determine which is vested exclusively in the courts. While this case also determined within the limits of its facts what testimony a witness might lawfully be required to give and conversely when the refusal of a witness to answer would be unlawful and a contempt under the statutes, it naturally did not preclude the possibility of further definition of contempt under the statutes.

In *Ex Parte Jennings*, 60 O. S. 319 (1899), the syllabus reads:

"A witness whose deposition is being taken before an officer may refuse to testify to facts not relevant to the issues in the case in which the deposition is to be read, if the disclosure of such irrelevant facts would be injurious to the business of the witness; and, if imprisoned by the officer for such refusal, he may be discharged on *habeas corpus.*"

This decision merely constituted a further definition of what questions a witness might lawfully refuse to answer, or stated in another way, what constitutes a contempt within the meaning of the deposition statutes. It held that a witness might lawfully refuse to answer any irrelevant question injurious to his business.

The syllabus of *In re Rauh*, 65 O. S. 128 (1901), reads:

"1. A deposition may be taken at any time after service of summons upon the defendant in the action, but it can be used on the trial only in the cases prescribed in Revised Statutes, Section 5265 (Ohio General Code 11525); and the deposition of any witness, whether a party to the action or not, may be so taken.

"2. A subpoena issued by a notary public for a witness to attend and testify in a deposition before the notary public may contain a clause directing the witness to bring with him any book, writing or other thing under his control, which he may be compelled to produce as evidence, and for disobedience of such a subpoena the notary public has power to punish the witness for contempt, by imprisonment."

This case further construed contempts as defined in the deposition statutes. It held that a refusal to produce material and relevant documents in response to a subpoena *duces tecum* issued by a notary public on the taking of a deposition constitutes a contempt within the deposition statutes.

Finally the delimitation of contempts, as defined in the deposition statutes of Ohio, was carried to a logical conclu-

sion in *Ex Parte Schoepf*, 74 O. S. 1 (1906). The syllabus reads:

"1. The clause in section 5247, Revised Statutes (Ohio General Code 11503), 'which he may be compelled to produce as evidence,' and as used in *In re Rauh*, 65 Ohio St., 128, must be construed with section 5289, Revised Statutes (Ohio General Code 11551), and is therefore limited to evidence pertinent to the issue, in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery.

"2. The rule in chancery as to compelling the production of documents for the purpose of evidence and inspection was and is that a party is entitled to a discovery of such facts or documents in his adversary's possession or under his control, as are material and necessary to make out his own case; but that this right does not extend to a discovery of the manner in which the adverse party's case is to be established, nor to evidence which relates exclusively to the adverse party's case.

"3. Where pursuant to a standing rule of the company, a report was made to the company's claim agent, * * * such report is a privileged communication and its production cannot be enforced in the taking of depositions in such suit before the trial.

"4. While an officer before whom a deposition is being taken is empowered to punish as for contempt any person who refuses to obey an order to answer a question or to produce a document, he cannot do so unless it is so 'lawfully ordered'; and where such question or document is not pertinent to the issues tendered or made, or is not material or necessary to make out the case of the party calling for it, or is incompetent or privileged, the witness cannot lawfully be ordered to answer such question or to produce such document."

This decision is the basis of the first and second of the propositions hereinbefore quoted from appellants' brief (see p. 22, *supra*). The case simply holds that a

witness may lawfully refuse to answer a question or produce a document where such question or document is immaterial, incompetent or privileged. It is, of course, manifest that the foregoing cases subsequent to *DeCamp v. Archibald, supra,* simply construe the deposition statutes to determine what constitutes unlawful refusals to answer or produce documents, and hence contempts, within the definition of such statutes. They do not furnish the slightest basis for a contention that the notary public is without power to hear and determine, held lawfully to be vested in such officer by *DeCamp v. Archibald, supra,* whether the disobedience or refusal of the witness constitutes a contempt as defined in the deposition statutes as they have been construed by the Supreme Court of Ohio.

The decision in *DeCamp v. Archibald, supra,* and the validity of the statutory scheme for taking depositions in Ohio with respect to the Federal Constitution was specifically affirmed in *Benckenstein v. Schott,* 92 O. S. 29 (1915). The syllabus reads:

> "1. A commissioner appointed by a court of another state to take depositions in Ohio is an officer in the sense in which that term is used in Section 11510, General Code.
>
> "2. That section as applied to such commissioner who seeks to punish a witness for contempt for his refusal to be sworn as a witness is constitutional."

In this case the court specifically held that the requirements of due process under the Fourteenth Amendment of the Federal Constitution with respect to affording notice and opportunity to be heard whether a contempt had been committed, as defined in the deposition statutes, was fully met by the power conferred upon non-judicial officers by such statutes.

Finally each point of law as ultimately developed has been reaffirmed by the Ohio Supreme Court in the instant

cases of *Ex Parte Bevan, Koehrman* and *Stranahan.* The material paragraphs of the syllabus read:

> "1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpoena.
>
> "2. The General Assembly did not violate any provision of the federal or state Constitution in the enactment of sections 11510, 11511, and 11512, General Code, in delegating such power to notaries public. *De Camp v. Archibald,* 50 Ohio St. 618, and *Beckenstein v. Schott,* 92 Ohio St. 29, approved and followed.
>
> "3. A witness committed by a notary public, under sections 11510, 11511, and 11512, General Code, has his remedy under section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross examination under the statute, the further right to test the relevancy or competency of the questions, and to demand his privilege, is preserved to him in the trial court."

Thus in the instant cases the Supreme Court of Ohio, in response to appellants' renewal of the ancient attack upon the deposition statutes upon the ground that such statutes, by conferring the power to hear and determine whether a contempt as defined in such statutes has been committed upon an officer other than a court, contravened the section of the State Constitution vesting all judicial power in the courts, reaffirmed its previous holdings that such power to hear and determine does not constitute "judicial power" in the sense in which that term is used in the pertinent section of the Ohio Constitution. The State court specifically reaffirmed its decision in *DeCamp v. Archibald, supra,* on that point. It reaffirmed its previous construction of the statutory contempts defined by the deposition statutes. It reaffirmed its holding that the grant

of power to officers other than a court to hear and determine whether a contempt, as defined in the deposition statutes, has been committed, satisfies every requirement of due process of law under the Federal Constitution and specifically approved *Benckenstein v. Schott, supra,* on that point. Each of the decisions of the Ohio Supreme Court hereinbefore quoted and analyzed may be searched in vain for any support for the appellants' erroneous contention set forth in their third and fourth propositions hereinbefore quoted. (See p. 23, *supra.*)

It is difficult to follow the refinements, ramifications and contradictions of appellants' argument, but they apparently seek to base their contentions upon the three following errors.

1. An unsupported and fallacious assumption that although the definition of what constitutes a contempt, as defined by the deposition statutes, which was set forth in *DeCamp v. Archibald, supra,* has been further clarified and settled by subsequent decisions of the Ohio Supreme Court, such further definition and clarification of what constitutes contempts under such statutes did not result in a corresponding delimitation of the lawful exercise of the power of a notary public to commit for contempt under such statutes so that the judicial definition of what constitutes contempts and the judicial definition of what constitutes the lawful exercise of the power of a notary to commit for contempt under the deposition statutes, are no longer coextensive or reciprocal. The fallacy of this contention is manifest from its mere statement.

2. A refusal to recognize the distinction between passing on questions of evidence so as to bind the parties to the lawsuit, a function belonging solely to the trial judge, and determining the same questions in a collateral proceeding *in re* the witness.

3. A misconception of the meaning of the statement appearing in several of the decisions that the witness disobeys the notary at his peril, a consequence of disobedience to the order of any competent judicial or other tribunal.

Appellants argue that since it was held in *DeCamp v. Archibald, supra,* under the facts of that case, that a witness could not lawfully refuse to answer a question except on the ground of privilege, a notary may now lawfully commit a witness for refusal to answer an incompetent or irrelevant question although subsequent decisions of the Supreme Court of Ohio have further delimited the obligation of a witness to answer under the deposition statutes by enlarging his rights so that he may now lawfully refuse to answer any incompetent or irrelevant question. They thus seek to draw the deduction that while subsequent decisions of the Supreme Court of Ohio have enlarged the scope of the questions which a witness may lawfully refuse to answer, the same decisions have not limited the definition of contempts, as defined in the deposition statutes, for which the notary public may lawfully commit for contempt. It is, of course, manifest that the court has gradually delimited contempts as defined in the deposition statutes and that, in so doing, it has settled, on the one hand, the lawful rights of the witness, and on the other, the lawful exercise of the powers of the officer before whom the deposition is taken. The contradictory and unsubstantial character of the appellants' argument is manifest.

The extremities to which counsel have been driven in their attempt to sustain this point is well illustrated by their reference to the suggestion of Judge Stephenson in the opinion below that a notary public might in a proper case be mandamused to commit a recalcitrant witness. The appellants seek to torture this dictum into the absurd contention that the courts of Ohio would mandamus a

notary to commit a witness who had lawfully refused to answer and upon application of the witness after his commitment would forthwith release him. (Appellants' Brief, 24-25.)

The keystone of the appellants' argument is based on the statement contained in the third syllabus of *DeCamp v. Archibald, supra*:

> "The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken."

and similar statements contained in the opinions in the cases of *Ex Parte Jennings, supra*, and *In Re Rauh, supra*. It is manifest that the statement as used in the syllabus of *DeCamp v. Archibald, supra*, referred to the exclusive function of the trial court to pass on such questions as between the parties to the action. Moreover, in that case the Court expressly sustained the power of a notary public to hear and determine in relation to the rights of the witness whether a contempt, as defined in the Ohio deposition statutes, had been committed and whether the witness might lawfully be required to answer. At page 625 of the Opinion, it is said:

> "The term 'judicial power' as used in the constitution is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determination of all suits and actions, whether public or private, there can be no doubt. But we think that it is equally clear that it does not necessarily include the power to hear and determine a matter, that is not in the nature of a suit or action between parties. Power to hear and determine matters more or less directly affecting public and private rights, is conferred upon and exercised by administrative and executive officers."

All basis for appellants' contention as to the power and duty of the notary to examine and determine the lawfulness or unlawfulness of the witness' refusal to answer is swept away in the opinion of *Ex Parte Jennings, supra,* at page 328:

"* * * The language of the section conferring authority upon the officer to punish a witness for refusing to answer 'when lawfully ordered' implies that punishment cannot be imposed for every refusal.

"It is familiar that an objection to the competency of the evidence to be elicited, *when interposed by a party to the action* in which the deposition is taken, cannot be either sustained or overruled by the officer. In such case the question of competency is for the court. But it seems quite consistent with the purpose for which depositions are taken that a witness may refuse to make disclosures which would operate to his personal prejudice without aiding the court in determining the rights of the parties, by reflecting either upon the issues in the case or upon the credibility of the witness. Accordingly the settled law upon the subject is as stated in *Church on Habeas Corpus,* section 319: 'The law has not invested such officers (notaries public) with arbitrary and omnipotent power to compel a witness to answer all questions however incompetent, irrelevant, immaterial or inadmissible. A refusal to answer such questions is not necessarily a contempt. To have power to commit for contempt, the notary must exercise his functions substantially in the manner and under the circumstances prescribed and contemplated by law. It has, therefore, been held that a witness will be discharged on *habeas corpus* where he has been committed for contempt by a notary public for failing or refusing to produce papers and testimony that are incompetent and inadmissible.' *Proffatt on Notaries,* section 31; *In re Beardsley,* 37 Kas., 666; *Ex parte Krieger,* 7 Mo. App., p. 637.

"The conclusions stated must be sound, unless the officer taking a deposition is released from limitations which the law imposes upon the authority of the judge before whom it is to be read, since a witness examined in court is not guilty of contempt in refusing to answer an incompetent question." (Italics ours.)

The statements in none of these cases go further than to point out that questions as to the admissibility of evidence as between the parties to the action can only be decided by the judge presiding over the trial of that action or by a court reviewing his decision. If it were to follow from this obvious rule that the trial court also had exclusive jurisdiction to pass on similar questions in connection with a witness' refusal to answer, then all courts and judges reviewing the notary's action on *habeas corpus* or under Sec. 11514 would be likewise precluded from hearing or determining such questions. But in *Ex Parte Jennings, supra,* the very case relied upon by the appellants to prove that the trial judge alone has power to pass on such questions to the exclusion of the notary, the Supreme Court of Ohio, reviewing the collateral proceeding of *habeas corpus,* considered at length the question of the competency and relevancy of the evidence sought to be elicited.

The distinction between the power to pass on the admissibility of evidence in the suit in which the deposition is to be used and the power to hear and determine whether the witness has unlawfully refused to give his deposition or unlawfully refused to answer a question has been consistently recognized by the Ohio authorities. In *Ex parte Woodworth,* 6 Ohio Dec. 19 at page 21, the court said:

"It is said that a notary public when taking a deposition has not power to decide as to the competency or relevancy of a question. For the purposes of the deposition and of the case in which the deposi-

tion is taken, he has not. But for the purpose of punishing a witness for contempt, he has. A notary public in committing a witness for contempt exercises judicial power. (21 Neb., 270.) The exercise of that power requires that he should find a witness who refuses to answer a question guilty of contempt. To find the witness guilty of contempt, the notary must determine whether the question asked was one which the witness could lawfully be ordered to answer; the determination of that fact necessarily requires the notary to pass on the competency of the question. *Proffat on Notaries,* 2 Ed., page 46."

The rule is stated in 14 *Ohio Juris.* 38 as follows:

"Questions relating to the admissibility of the evidence to be elicited by particular questions propounded to a witness, testifying by deposition, cannot be finally decided by the officer before whom the deposition is being taken, such questions being reserved for the determination of the court when the deposition is offered in evidence. Such officer may, however, order the witness to answer, when in his opinion the question is proper, and, while it has been said that the officer before whom a deposition is being taken has no power to excuse the witness from answering, except as to such questions as would tend to incriminate him, it seems clear that the officer has the right to exercise his discretion as to whether or not he will order the witness to answer, and so, for such purpose, he is empowered to make a tentative or provisional determination as to the propriety of the question or the admissibility of the testimony sought to be elicited. Objections and exceptions made during the taking of the deposition should be noted thereon."

This distinction drawn in the Ohio authorities is familiar in Federal practice. *Nelson vs. United States,* 201 U. S. 92, 114; *Dowagiac Mfg. Co. vs. Lochren* (8 C. C. A.), 143 Fed. 211, 215.

In a final attempt to prove their proposition that the notary has no power to hear or determine, appellants have

seized upon the statement made in *Ex Parte Jennings, supra, In re Rauh, supra,* and *Ex Parte Schoepf, supra,* that the witness disobeys the notary at his peril, but obviously there is no inconsistency between this statement of the Ohio Supreme Court and the principle that the notary may determine, as far as the witness is concerned, whether the witness can be legally ordered to answer. Even after the most complete of hearings and determinations by the officer, notary or judge, the witness acts at his peril when he refuses to answer, for if the reviewing court finds that the original determination was correct, the witness must remain in jail until he obeys. It is obvious from an examination of *Ex Parte Jennings, supra,* at page 331, that the statement that a witness refuses to answer at his peril was made by the court in order to emphasize the rule that the sincere belief of the witness as to the impropriety of the question propounded will not excuse his refusal to answer if as a matter of law the question is a proper one. One disobeys an order of a court at his peril but that does not mean that the court is without jurisdiction to determine whether his disobedience constitutes contempt.

Another favorite variation of this argument by appellants is that, since the witness refuses to answer at his peril, the notary may commit the witness whether his refusal to answer was in fact lawful or not. If this argument means anything, it is merely to say that the officer may err. Even courts sometimes err, but the possibility that either a court or an officer may err does not make it unconstitutional for courts or officers to hear and determine matters entrusted to their decision.

Ultimately the question now before this Court, *i.e.,* whether the statutory scheme of Ohio affords due process of law, was met by the Supreme Court of Ohio in the case of *Benckenstein v. Schott, supra,* where it was stated at page 41:

> "It is said by the supreme court of the United States that due process of law has never been precisely defined, but it does not require a plenary suit or a trial by jury, nor is it necessarily judicial procedure. In *Iowa Central Ry. Co. v. Iowa*, 160 U. S., 389, it is held: 'The fourteenth amendment to the constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided.' We think these requirements are met by the procedure provided in the statutes under consideration, and we are unable to say that there has been a failure of due process of law in the proceeding which is challenged by plaintiffs in error."

The court there adopted a rule, namely, notice and hearing before decision on the issues, which necessarily included a determination and exercise of discretion by the notary.

2.

**The delegation of power to an officer other than a court or judge to hear and determine whether a witness has committed a contempt, as defined in the deposition statutes, does not deny due process of law. A right of appeal or review is not an essential element of due process, and manifestly the provision for a full, free and untrammeled judicial review of all questions of fact or law afforded by Section 11514, Ohio General Code, can not violate the Fourteenth Amendment, but only evidences the care of the State to safeguard every legitimate interest of a witness.**

The appellants first purport to recede from the untenable proposition, urged in the courts below, that due process of law requires a hearing before a court or judge and

that the Ohio deposition statutes, in providing for hearing and determination by a notary public, are therefore void under the Fourteenth Amendment as denying due process. (Appellants' Brief, 29.) However, throughout their brief in this Court they assert that due process requires notice and opportunity to be heard "by a court having jurisdiction" (Appellants' Brief, 31), and finally appellants return to their argument, advanced below, by citation and quotation of cases holding that under the particular Constitution involved judicial power could not be conferred upon an administrative or non-judicial officer. (Appellants' Brief, 47-52.) Of course, if the proceedings *are* before a court, the court must have jurisdiction; but noth ng is better settled than that so long as there be given notice and opportunity to be heard before an officer or tribunal having jurisdiction, a hearing need not be before a court, judge or judicial tribunal to constitute due process of law. *Dreyer v. Illinois*, 187 U. S. 71, 83; *Reetz v. Michigan*, 188 U. S. 505. In the syllabus in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, it is said:

> "Nothing in the Federal Constitution prohibits a State from conferring judicial functions upon non-judicial bodies."

In *Crowell v. Benson*, 285 U. S. 22, Mr. Chief Justice Hughes, in discussing whether Congress could make the findings of a Deputy Commissioner, in the enforcement of the Longshoremen's Compensation Act, on the facts upon which the jurisdiction of the officer under the statute and the constitutional power of the Congress depended, final so as to preclude a review by the courts, said at page 56:

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. *Nor have we simply the question of due process in relation to notice*

*and hearing.* It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend."

And then at page 57:

"In this aspect of the question, the irrelevancy of State statutes and citations from State courts as to the distribution of State powers is apparent. *A State may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to State authority.*" (Italics ours.)

It is necessary to distinguish cases where particular statutes conferring certain powers upon officers or tribunals have been held to be unconstitutional as in violation of provisions of particular constitutions requiring a separation of legislative, executive and judicial powers, or vesting all judicial power in certain courts, so that the officer or tribunal was without jurisdiction. In such cases there is, of course, a denial of due process because of the absence of jurisdiction, *but the denial of due process does not rest upon the circumstance that the power to hear and determine has been conferred upon an officer other than a court or judge, but upon the proposition that the attempt to endow the officer or tribunal with such power has failed because of the prohibition of a wholly different section of the particular Constitution.* However, the Ohio Supreme Court has construed the Ohio Constitution not to prohibit the grant of such power to an officer other than a court; and it is elementary that the construction of a State Con-

stitution by the highest court of the State is binding upon and will not be reviewed by this Court. Thus in *Carfer, Sheriff v. Caldwell*, 200 U. S. 293, the petitioner sought release in *habeas corpus* from a commitment issued by the House of Delegates of West Virginia. It was contended that this power could not be conferred upon a committee of the State Legislature. In holding that this raised no question under the due process clause, the court said at page 297:

> "The Circuit Court was of opinion that the subject which the committee was appointed to investigate was not within the jurisdiction of the legislature, as defined by article 5 of the constitution of West Virginia, declaring that 'the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.' But that objection does not 'present any question under the due process of law clause of the Fourteenth Amendment.' *Dreyer v. Illinois*, 187 U. S. 71, 83; *Reetz v. Michigan*, 188 U. S. 505."

Many other cases could be cited to support the principle that due process of law does not require a hearing before a court, judge or judicial tribunal. Thus in *Kilbourn v. Thompson*, 103 U. S. 168, relied upon by appellants, it was held that the House of Representatives might exercise judicial power in appropriate cases. Yet, if this had been a question of due process of law, the holding would have been in the teeth of the Fifth Amendment of the Federal Constitution.

The appellants cite Federal decisions and decisions from other States to the effect that power to punish for contempt, being judicial in nature, could not *in those jurisdictions* be conferred upon officers other than courts or judges. (Appellants' Brief, 47-52.) All of the State cases cited turn upon the separation of powers under the re-

spective State Constitutions. That they are inapposite is manifest. To the extent that the concept of due process is involved at all in such decisions, it rests solely upon the question whether under the particular State Constitution the grant of power to the officer is void so as to leave the officer without jurisdiction. That is, the resulting denial of due process does not rest upon the circumstance that the power to hear and determine has been conferred upon an officer other than a court or judge but upon the proposition that the attempt to endow the officer with such power has failed because of the prohibition of a wholly different section of the particular Constitution. In States whose Constitutions, like the Ohio Constitution, do not prohibit the grant of such power to such officer other than a court or judge, it is well settled that no denial of due process results. *Noell v. Bender, Sheriff*, 317 Mo. 392, 295 S. W. 532; *Dogge v. State*, 21 Nebr. 272, 31 N. W. 929. Likewise, Federal cases, such as *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, involving the separation of powers under the Federal Constitution, are clearly without application.

*People v. Leubuscher*, 34 App. Div. 577, 54 N. Y. S. 869, involved, in addition to the question of separation of powers, the further proposition that a Colorado Court could not appoint a commissioner to take testimony in New York State and confer upon the Commissioner the power to sit in New York State and punish witnesses for contempt in New York State. This resulted from the elementary proposition that the process of a State cannot be made effective beyond its geographical jurisdiction.

Likewise, *Ward Baking Co. v. Western Union Telegraph Co.* 200 N. Y. S. 865, 205 App. Div. 723; *In re Ziebold*, 23 Fed. 791 and *In re Sims*, 54 Kans. 1, 37 Pac. 135, involve, in addition to the question of separation of

powers under State Constitutions, the further objection that the statute conferred upon one officer mixed judicial and other powers simultaneously to be exercised by such officer in such a way as to pass upon the propriety and validity of his contemporaneous acts, *i.e.*, such as permitting a Prosecuting Attorney to hold an inquiry and simultaneously determine the propriety and validity of his questions put as Prosecutor and his other actions taken as Prosecutor. Clearly none of these cases are any authority for the proposition that the delegation of power to commit to a Notary violates the Fourteenth Amendment.

Finally the appellants contend that even if the notary has been lawfully granted under the statutes of Ohio the power to hear and determine whether a contempt, as defined in the Ohio deposition statutes, has been committed, and, if he so determines, to punish as for contempt, the Ohio deposition statutes are nevertheless void because the provision for court review on both facts and law follows rather than precedes commitment for contempt or attachment to institute contempt proceedings. (Appellants' Brief, 45-52.) The appellants base this contention upon *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U. S. 287 and *Crowell v. Benson,* 285 U. S. 22. Appellants' proposition is that where power has lawfully been conferred upon a non-judicial officer to do a certain act, it is a denial of due process of law for the officer to do the act before it has been reviewed by a court; and obviously the action cannot be reviewed by the court until it has been taken by the officer. It is like the classical statute which forbade any railroad train meeting another at a railroad intersection from proceeding until the other had passed. The point in *Ohio Valley Water Co. v. Ben Avon Borough, supra,* was not that no judicial examination preceded the fixing of the rates by the State Commission but that the State stat-

utes and procedure permitted no judicial review of whether the rates so fixed were confiscatory. In *Crowell v. Benson, supra,* it was not held that the Longshoremen's Compensation Act was unconstitutional because it did not provide for a judicial determination *before* action by the administrative officer, but that it was constitutional because it did provide for judicial review, *after the action* of the administrative officer, of his findings on questions of fact determinative of the existence of the officer's jurisdiction and determinative of the existence of the constitutional right asserted. The *Crowell* case simply holds that a statute cannot constitutionally make the findings of an administrative officer or tribunal final on questions of fact which are determinative of the jurisdiction of the officer or tribunal, or determinative of constitutional rights asserted before such officer or tribunal so as to preclude a review by the courts. It held that the Federal statute could not constitutionally prevent a review by the Federal Court of whether the case in fact involved an employment in interstate commerce on Federal waters, for those facts constitute the basis of the alleged constitutional right sought to be asserted. But no more could the findings of fact of a State or lower Federal Court be made conclusive upon this Court where the determination is essential to the adjudication of a constitutional question. Clearly, the case in principle has not the most remote application to the cases at bar. *First,* the case does not hold, as counsel would make it appear, that even in the matter of jurisdictional facts and facts determinative of constitutional rights the court review must precede the action of the officer. *Second,* in the instant cases, a full, free and untrammeled review of the action of the committing magistrate, unprejudiced by any findings or conclusions on his part, is afforded by and has been had under Section 11514, Ohio General Code.

The distinction made in *Crowell v. Benson, supra,* which seems to confuse the appellants (Appellants' Brief, 46), arises out of the proposition that particularly in the Federal Government and to some extent in State Governments, there are matters legislative in character within the admitted field of legislative power with which, if it were not so inconvenient, the legislative power could deal directly and in detail by statute. In those cases the legislative power may delegate the exercise of the legislative function, under suitable standards, to administrative and executive officers and make their findings and conclusions final so as not to be subject to review by the courts, just as would be the similar action of the Congress or Legislature if taken directly. Such a matter is illustrated by the power of Congress to declare a bridge to be or not to be an obstruction to navigation, and the delegation of that power by Congress to the Secretary of War so that his action has the same effect. But this distinction has not the slightest application to the fallacious proposition urged by appellants.

## C.

**Even if Sections 11510, 11511 and 11512 Could Be Construed, as They Can Not, so as to Provide Only for Summary Action by the Examining Magistrate With Postponement of the Hearing Necessary to Satisfy Due Process, as Erroneously Urged by the Appellants, the Hearing and Determination Provided by Section 11514 Before the Conclusion of the Ohio Statutory Scheme for the Compulsion of Testimony Would Satisfy Due Process of Law in View of the Important Public Interest in, and the Compelling Requirements of, the Prompt and Efficient Administration of Civil Justice.**

The appellants, indulging again in the fallacious assumption that the hearing provided before the notary does

not satisfy due process of law, contend that provision for relief after imprisonment does not afford due process and that these cases do not fall within the class of proceedings where due process permits postponement of judicial inquiry. (Appellants' Brief, 35-45.) Any discussion of the proposition urged by appellants is academic, since, as hereinbefore shown, the hearing afforded by the statutes before the notary satisfies every requirement of due process of law. The appellee has never, as suggested by appellants, urged the converse of appellants' proposition, for the reason that the facts in these cases render the proposition immaterial. However, were the question presented, appellee submits that these cases would fall within the class of proceedings where due process permits postponement of judicial inquiry.

Our previous discussion of the Ohio statutes and the powers thereby conferred upon notaries public as construed by the Ohio Supreme Court has, we believe, fully answered the technical questions of due process of law raised by the appellants. This discussion has been based upon the assumption that the restraint complained of by the appellants and from which they are seeking relief is the physical restraint imposed upon them by the technical arrest of the Sheriff. It is obvious, however, that their real complaint and the actual restraint which they are facing is not imprisonment, but the forced attendance at a deposition and the compulsion of testimony, oral and documentary. Clearly this is the substance of Ohio's statutory scheme and the underlying basis of these appeals. This Court has at numerous times held itself to be governed by substance rather than by form when determining whether the elements of due process are present. *Simon v. Craft*, 182 U. S. 427, *Louisville & Nashville R. R. v. Schmidt*, 177 U. S. 230. The subpoenas, orders, and writs of commitment and attachment issued by the notary are

but steps in the procedural scheme which is not completed until the witness has been compelled to attend, speak and give his evidence, the ultimate goal of the entire proceedings. Prior to this conclusion of the proceedings, the witness is afforded an opportunity for a full judicial hearing before any judge in the state, at which hearing, after the introduction of evidence and argument, it is judicially determined whether the witness must attend and give his evidence as ordered by the subpoena and the officer presiding at the deposition. We submit that this hearing afforded by Section 11514 satisfies the requirements of the Fourteenth Amendment.

Thus in the analogous case of *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, it was held at 551:

> "So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded."

The fact that during the course of the proceedings an intermediate order is made by an administrative officer, even if this order standing alone did not afford due process of law as erroneously contended by the appellants, does not invalidate the procedural scheme as a whole. Many instances can be found in which this Court has approved a procedure under which a person is deprived of his property by preliminary administrative order without hearing subject to a review by the courts at the instance of the person so deprived. *Phillips v. Commissioner*, 283 U. S. 589; *Davidson v. New Orleans*, 96 U. S. 97. It is argued by the appellants that these cases are not applicable because they deal with the assertion of public rights against the property of the individual and are warranted only because public interest requires summary action. (Appellants' Brief, 41-44.) The distinction which appellants thus try to draw is manifestly non-existent for the public interest

in procuring the prompt and efficient administration of civil justice has an importance equal to, if not greater than, the collection of taxes or the imposition of public burdens upon private property.

The case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413 and similar authorities cited by the appellants at pages 35-41 of their brief are manifestly inapplicable to the cases at bar in view of the ample notice and opportunity for hearing afforded by the proceedings before the notary. Those authorities are also readily distinguishable from the principle laid down in *Phillips v. Commissioner, supra*, that due process permits a postponement of judicial inquiry until the conclusion of the entire proceedings, especially where the public interest so demands, which principle we have suggested would govern these appeals were it necessary, which it is not, to rely on the hearing afforded by Section 11514. In the case of *Coe v. Armour Fertilizer Works, supra*, this Court declared unconstitutional statutes of Florida which permitted a judgment creditor of a corporation to levy execution upon the property of any shareholder of the corporation to the extent of his unpaid subscription to the company's stock as shown on the public records. Such execution could issue without any notice whatsoever to the shareholder. If, however, the levy were fortuitously discovered before the sheriff's sale, the shareholder might attempt to restrain the levy by injunction or motion, his defense being limited however to a showing that he was not a subscriber to the extent claimed or that his subscription had in fact been paid. The vice of such a statutory scheme is not that a preliminary lien has been placed upon the shareholder's property as to which he is subsequently notified and given a hearing, but that he may irretrievably lose his property before he receives notice that it has been levied upon and sold and consequently without any opportunity to present such defenses as he

may have. In the instant cases, however, from the moment of his arrest, which is notice of the most forceful character, the witness is given an opportunity to try out in any court he wishes the question whether he must forego his liberty and appear and testify. In the case of *Meyers v. Shields*, 61 Fed. 713, a suit to enjoin the collection of back taxes which had been assessed upon the property of the plaintiff without notice or opportunity for hearing, the only remedy available by statute was the right to interpose a defense in a suit to collect the taxes. This was but an unsubstantial remedy, for, as pointed out by the court at page 724, the collector might not elect to bring suit but instead might enforce the tax by distraint and sale in which event the taxpayer would have no opportunity to present his defenses.

## III.

## THE PROCEEDINGS HAD IN EACH OF THESE CASES STRICTLY COMPLIED WITH THE STATUTES AND DID NOT, AS A MATTER OF FACT, DENY DUE PROCESS OF LAW TO ANY OF THE APPELLANTS.

The contention that, even though the Ohio statutes are constitutional, the proceedings actually had in any of these cases constitute in fact a denial of due process of law is not open to any of these appellants on these appeals. (See Section I, pp. 11-12, *supra.*) However, the contentions of the appellants on this point are severally without merit.

### A.

### The Proceedings Had Before the Notary Public Did Not, as a Matter of Fact, Deny Any of the Appellants Due Process of Law.

The constitutionality of the statutory scheme provided by Sections 11510, 11511 and 11512 with respect to the requirements of notice and opportunity for hearing has al-

ready been shown. (Sec. II, A, pp. 14-20, *supra.*) The action of the notary was in strict conformance to those sections and satisfied every requirement of due process.

It is urged on behalf of the appellant, Bevan, that neither he nor his counsel received notice or were given an opportunity to be heard, that the notary did not conduct a formal hearing as to whether the witness' deliberate refusal to testify or produce any of the material called for by the subpoena *duces tecum* constituted a contempt and that the notary signed and issued the order of commitment in the absence of the appellant and without notice to him or his counsel. (Specification No. 2 of the assigned errors which are intended to be urged, Appellants' Brief, 8.) As to these points the record discloses that the appellant, Bevan, appeared pursuant to the notice and order of a subpoena *duces tecum* personally served upon him, which closed with the words "Hereof fail not under penalty of the law." (Bevan, 44-46.) In disregard of the ample notice afforded by his subpoena and the oral command of the notary the appellant refused to produce any of the records called for (Bevan, 52, 65) and after answering one or two preliminary questions refused to answer certain questions found by the Court of Appeals of Lucas County and the Supreme Court of Ohio to be material (Bevan, 54-65), and finally informed the notary that he would not answer any further questions. (Bevan, 66.) Without making any claim of privilege he attempted to show cause why he should not answer by stating that he refused on advice of counsel, which, as is stated in the opinion below, was no reason at all, and further through his counsel why he should not be required to answer or obey the subpoena *duces tecum.* (Bevan, 47-48, 56-66.) His counsel was notified by the notary that he intended to issue a writ of commitment. (Bevan, 110.) His contempt, as has hereinbefore been shown, was committed in the presence of the magistrate

authorized by law to commit him therefor, without further citation or hearing. It is clear, both on principle and authority, that one committing a contempt under such circumstances cannot defeat the exercise of that power by leaving before the process of commitment can be prepared, or before he is apprehended by the sheriff or bailiff. *Ex Parte Terry*, 128 U. S. 289, 311; see also p. 15, *supra*. In the determination of whether the commitment of a witness for contempt committed in the face of the committing power without further notice or opportunity to be heard, constitutes due process of law, it is manifestly immaterial whether the authority of the committing power so to punish rests upon a valid statute or is inherent.

Apparently the appellants, Koehrman and Stranahan, have abandoned their contentions that they were unconstitutionally denied due process of law by the proceedings and actions of the notary, for these claims have been omitted from their "Specifications of the Assigned Errors Which are Intended to be Urged." (Appellants' Brief, 6-11.) The abandonment of this contention was clearly well advised, for the action of the notary with respect to the appellants, Koehrman and Stranahan, was in strict conformance to Sections 11510 and 11511 which have heretofore been shown to meet every requirement of notice and opportunity for hearing. (Sec. II, A, pp. 14-20, *supra*.) The appellants, Koehrman and Stranahan, both disobeyed their subpoenas and failed to appear. Each of the subpoenas was personally served by the notary himself and that fact attested to by affidavit. (Kroehrman, 45, 68; Stranahan, 42, 65.) When it thus appeared that the appellants had disobeyed the subpoenas personally served upon them, the notary issued attachments commanding the Sheriff to attach their bodies and bring them respectively before him "to answer the State of Ohio for said contempt in disobeying said subpoena." (Koehrman, 45-46; Stranahan, 42-43.) The issu-

ance of the writ of attachment initiated the proceeding for hearing. The appellants refused such hearing and prevented it by untimely resort to the courts. (Koehrman, 36, 67; Stranahan, 36, 65.) They can base no rights on the absence of a hearing they thus prevented and refused to have. Any suggestion that a writ or warrant of arrest may not be signed or issued except upon additional notice to and in the voluntary presence of the person sought to be arrested is manifestly absurd.

Furthermore each of the three appellants, Bevan, Koehrman and Stranahan, has had the benefit of a full, free and untrammeled review pursuant to the provisions of Section 11514 by one of the State Courts of Appeals of Ohio and by the Supreme Court of Ohio and both courts have found that the examining officer proceeded in strict compliance with the law. Were such review essential, as it is not, it would properly be considered in determining the adequacy of the due process provided by the State, its officials and tribunals. *Frank v. Mangum,* 237 U. S. 309, 327.

1.

**Appellants' arguments that due process of law has not been afforded by the Ohio Statutes are severally either irrelevant or based upon the fallacious assumptions that the notary is without jurisdiction or that notice and an opportunity for hearing have, in fact, been denied.**

In our previous discussion of the constitutionality of Sections 11510, 11511 and 11512, according to their terms (Sec. II, A, pp. 14-20, *supra*), we made no reference to those sections of Appellants' Brief which purport to argue against the validity of the statutes (Appellants' Brief, IV, 2, A, B, C, pp. 31-35) for the reason that the misleading principles and authorities there cited have no bearing on the question whether Sections 11510, 11511, and 11512 sat-

isfy the requirements of due process of law. It would be sufficient to dispose of these and many other contentions of appellants merely to point out that they severally rest upon the fallacious assumption that a notary under the laws of Ohio is without jurisdiction. However, we consider them briefly.

The proposition "A. Due Process Requires Notice and an Opportunity to Be Heard Before a Judicial Tribunal Empowered to Hear and Determine and Having Jurisdiction of the Subject Matter" (Appellants' Brief, 31) is totally irrelevant. It rests, as do practically all arguments of appellants, upon the fallacious and unsupported assumption that the notary is without jurisdiction. So far as it implies that due process forbids the delegation of the power to hear and determine to an officer other than a court or "judicial tribunal" we have hereinbefore shown it to be erroneous. See Section II, B, 2, pp. 39-46, *supra.*

The proposition "B. Notice Imports an Opportunity to Defend, and a Denial of the Benefit of Notice Is in Effect a Denial of Notice" (Appellants' Brief, 32) offers no attack upon the statutes, for clearly the statutes, according to their terms, do not deny the witness a hearing or any benefit of the notice given him unless reliance is again placed upon the unsounded hypothesis that a notary is without power to hear and determine. Nor are the authorities of *Londoner v. Denver,* 210 U. S. 373 and *Hovey v. Elliott,* 167 U. S. 409, made relevant by the facts, for as we have shown above, the procedure in the case of Bevan satisfied every requirement of due process of law as applied to contempts committed in the face of the committing magistrate and the appellants Koehrman and Stranahan can base no right to release upon the absence of a hearing which they prevented by untimely resort to the courts.

The proposition "C. Appearance Before the Notary for Examination Will Not Authorize Commitment With-

out Notice of the Charge of Contempt and Opportunity to Defend'' (Appellants' Brief, 33), which refers only to the case of Bevan, is based upon the fallacious premise that Bevan was wrongfully deprived of notice and an opportunity to defend. We have already shown that Bevan was notified by a subpoena that he would be required to testify, that he received specific orders to answer from the notary, that he was given ample opportunity to show why he should not answer, and that his counsel knew a writ of commitment would follow, unless he submitted to the notary's order. In the case of *In Re Rosser,* 101 Fed. 562, the referee in bankruptcy undertook to assess a money judgment against Rosser upon a mere citation to appear for examination. The inappositeness of that case to the one at bar is transparent.

Sections D and E of Appellants' Brief, pp. 35-45, to the effect that due process does not permit the postponement of judicial review and inquiry until after imprisonment is, of course, predicated upon the assumption that the prior proceedings before the notary public did not in themselves afford due process of law. We have already shown this assumption to be without basis in fact or law; and, hence both propositions urged by appellants are patently irrelevant. The answer to the cases of *Coe v. Armour Fertilizer Works,* 237 U. S. 413 and *Meyers v. Shields,* 61 Fed. 713, so far as appellants attempt to apply them to the instant cases, is that Bevan had all the notice and hearing required by due process for a contempt committed in the face of the magistrate and that Koehrman and Stranahan have prevented a hearing on the charges of contempt against them pursuant to their attachments by procuring the intervention of the court. However, at pp. 46-50, *supra,* we have given consideration to the academic question whether the judicial hearing afforded by Section 11514 does not satisfy the requirements of due process of

law with respect to the entire statutory scheme for compulsion of testimony, assuming for the sake of argument the appellants' fallacious contention that the proceedings before the notary did not meet those requirements, and we have there discussed the cases cited by appellants. Likewise, at pp. 44-46, *supra*, we have considered and shown to be without merit appellants' contention contained in Proposition F, Appellants' Brief, pp. 45-52, that the state law must provide an opportunity for submitting constitutional and jurisdictional questions to a court before commitment.

**B.**

**The Suggestion that the Record Discloses a Disqualifying Pecuniary Interest of the Notary is Without Basis in Fact or Law, But, Were Such Disqualifying Interest Assumed to Exist, the Record Would Establish Both That It Was Waived by the Appellants and Cured by the Subsequent Review.**

As has heretofore been pointed out (*supra*, pp. 9, 11) appellants' contention that the notary was disqualified by pecuniary interest, arises from the fact that, as authorized by statute, the notary acted as stenographer at the taking of the deposition and received for his services as such stenographer a flat fee of twenty-five cents per hundred words transcribed. The statutes, Section 11529 which authorizes the notary to take depositions, Section 11537 which authorizes the notary to also act as stenographer, Section 127 which authorizes the notary to charge the same fee as a Justice of the Peace for such services, and Section 1746-2 which allows a Justice of the Peace the above fee of twenty-five cents per hundred words, have never been questioned by the appellants, either in the proceedings below or in the assigned errors relied upon in this Court. Appel-

lants are therefore not in a position to attack a factual situation which is expressly authorized by State statutes which have not been questioned. Appellants' contention, however, even could it be raised, is manifestly without merit.

1.

**The Notary had and has no disqualifying interest in fact.**

Upon the record in these cases the notary had and has no disqualifying interest in fact within the rule of *Tumey v. Ohio,* 273 U. S. 510 or any other case cited by the appellants. The direct disqualifying interest laid down in the *Tumey* case was one where the committing magistrate's right to *any* compensation for the services rendered depended upon whether his decision should be adverse to the person committed. In the latter instance the magistrate was compensated. If he freed the defendant, he received no compensation for his services. Similarly, in *Meyers v. Shields, County Treasurer,* 61 Fed. 713, the County Treasurer received no compensation for his services unless he decided against the taxpayer. In the instant case the notary is compensated for the services actually performed; and his compensation for services actually performed is no greater and no less whether or not he commits the witness. (Bevan, 114-116; Koehrman, 91-93; Stranahan, 89-91.) The possibility that the length or extent of his services may be affected is incidental, collateral and remote. No case has been cited and we know of none where any court has ever held that such a circumstance constitutionally disqualified the officer to act. Every case cited by the appellants on the subject of disqualification is one where the right of the officer to any compensation for services actually rendered depended upon the nature of his decision. The supposed pecuniary interest of the notary,

if any, is of course only indirectly connected with his rulings and the assumption of interest is based upon a further assumption that the notary would be without employment if he did not prolong the taking of testimony. No evidence whatsoever was introduced in support of any such assumption and it is submitted that no such inference can be validly drawn. If an inferential desire for continued employment in the matter then at hand constitutes a disqualification under the due process clause of the Fourteenth Amendment, then no reference in which the Referee is paid on a per diem basis can be constitutional, the decision of the Referee being based on folios of testimony admitted or compelled by him for the ulterior purpose of lining his own pocket by prolonging the hearing, and any case decided by a Common Pleas Judge or Judge of the Court of Appeals of Ohio, sitting by assignment in a County other than his own, may be similarly attacked on the ground that in addition to his regular salary and expenses such Judge is entitled to $20.00 per day during the course of the case to which he has been assigned and may thus be influenced in his rulings on evidence. (See Ohio General Code, Sections 2253 and 2253-3.)

That the expectation of further employment does not disqualify a magistrate is shown by the case of *Commonwealth v. Keenan*, 97 Mass. 589. In this case the magistrate acted as his own clerk, and was thus entitled to fees. It was held at page 590:

> "The fees which the law gives for the performance of official duties in relation to civil or criminal proceedings, do not constitute an interest in the proceedings. They are to be regarded simply as an equivalent for the service performed. A magistrate is not disqualified to render a judicial decision because he may thereby make further official action necessary for which he will receive the appropriate compensation in fees.

> And the court are of the opinion that the case is not changed by the fact that such subsequent service is to be rendered, and fees received, in a different official capacity. The ground of interest relied upon to deprive the magistrate of the jurisdiction which he exercised in this case, is too remote and contingent to have that effect; and his interest is also, in legal estimation, equally balanced. The exceptions are therefore overruled."

In the case of *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, a statute provided for the assignment of a certain Judge to hold court in a certain county with additional compensation. In the course of the trial the Judge, in determining his jurisdiction, had to pass on the validity of the statute. It was urged that the Judge was disqualified by pecuniary interest, but the Supreme Court of Wyoming held that the contention was without reason as every Judge must necessarily determine for himself in the first instance the territorial extent of his jurisdiction. See also *Ex Parte Lewis*, 288 Pac. 354 (Okla. Crim. App. 1930).

Indeed the factual basis of the contention is fanciful. Thus any fiduciary is disqualified to act while serving an interest adverse to the interests of his *cestui*. Yet courts of chancery universally recognize that a fiduciary is entitled to compensation measured by the extent of the services rendered. But if the doctrine of adverse interest were pushed to the fanciful extremes urged here, such fiduciaries would in all cases be disqualified to act because they necessarily have to determine the extent of the services required in furthering the interests of their beneficiary; and the result would be that we could have no qualified fiduciaries. Again, any lawyer would be subject to disbarment who would represent a client while simultaneously serving an interest adverse to his client; but it is universally recognized that a lawyer is also entitled to compensation measured by the extent of the services rendered. How-

ever, under the theory advanced by the appellants a lawyer would continually be serving an adverse interest by reason of the necessity of determining the extent of his services required to protect the interests of his client. Obviously this sort of situation is a far cry from the disqualifying interest condemned in the *Tumey* case. When these appellants vainly sought release on *habeas corpus* from the Federal Court, Honorable Benson W. Hough, District Judge, refused even to hear argument on this contention.

Nor can it be said that the notary was in the exclusive employment of the plaintiff, or that he was the creature of the plaintiff. He is an official of the State appointed for the express purpose of presiding at the taking of depositions and under the duty of conducting the proceedings impartially and according to law. Appellants' attempted analogy to *In re Sims*, 54 Kan. 1, 37 Pac. 135, and *In re Ziebold*, 23 Fed. 791, which were cases in which the public prosecutor was vested with the power to pass upon the propriety and compel the production of whatever evidence he desired, is predicated on the manifestly false premise that the notary was by law obliged to grant each request of the interrogating party, irrespective of its lawfulness or unlawfulness. We have already demonstrated that this proposition is diametrically opposed to the plain wording of Section 11510 and to the duties of the notary as expressed by the decisions of the Ohio Supreme Court (Sec. II, B, 1, pp. 22-39, *supra.*) The high esteem in which the office of notary public is held by the Ohio courts is evidenced by the statement of Judge Stephenson in the opinion below:

> "* * * As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers should not be under any obligation to the electorate of

> his county. A notary public is appointed by the governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to perform the duties of the office, or ascertain same by an examination prescribed by the rules of court."

Moreover, the impartiality of his rulings is safeguarded by *Ohio General Code*, Section 11532:

> "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

and Section 131:

> "A notary public who charges or receives for an act or service done or rendered by him a fee or reward greater than the amount prescribed by law, or who dishonestly or unfaithfully discharges any of his duties as notary public, shall be removed from his office by the court of common pleas of the county in which he resides, upon complaint filed and substantiated in such court, and the court shall thereupon certify such removal to the governor. The person so removed shall be ineligible for reappointment to the office of notary public."

It thus can no more be claimed that the notary is in the employ of the party calling upon him than that a judge to whom is submitted an application for a writ of *habeas corpus* or a motion for a restraining order is in the employ of the applicant therefor. The appellants, through their counsel, ordered copies of the transcription and thus the "employment," if any, was mutual. (Bevan, 115; Koehrman, 93; Stranahan, 90.)

2.

**Assuming, as was not the fact, that the Notary was disqualified by pecuniary interest, failure of appellants to make timely objection on the ground of the supposed disqualification constituted a waiver.**

If it were assumed that a disqualification of the notary as a matter of fact and law existed, it was waived by failure on the part of all of the appellants to make seasonable objections. The contention that the notary was disqualified by interest was first raised by amended applications filed on the day of hearing of the applications in the Court of Appeals of Lucas County. (Bevan, 69; Koehrman, 47; Stranahan, 44.) Their counsel, in writing, expressly waived proof of the official character of the notary. (Bevan, 129; Koehrman, 106; Stranahan, 104.) Koehrman and Stranahan have never been committed. They did not appear, but were represented by counsel at the hearing. Bevan appeared. He knew that the notary was taking the testimony; he knew that the notary would transcribe it. His counsel ordered copies of the transcription. (Bevan, 115.) He knew that under the laws of Ohio it would be the duty of the notary to order him to answer and punish him for contempt if he failed to answer any pertinent question. The notary did order him to answer, but he still made no objection. (Bevan, 115.) If that objection had then been made, another stenographer could have been called to take the testimony. Under these circumstances, he cannot sit idly by and then claim that he is released on the basis of a disqualification, if any, of the officer, of which he at all times knew. *State ex rel. Bowman v. Commissioners,* 124 O. S. 174, 177 N. E. 271; *Tari v. State,* 117 O. S. 481, 159 N. E. 594. The *Tumey decision* is discussed in the foregoing cases and shown to be inapplicable where timely objection has not been made, as is the fact in the instant case.

The dictum in the case *In re Sage*, 24 O. C. C. (N. S.) 7, relied upon by the appellants, does not support their contention that the objection was raised in accordance with the State practice, but were the fact otherwise, such dictum is clearly overruled by the decisions of the Ohio Supreme Court in the case of *State ex rel. Bowman v. Commissioners, supra,* and *Tari v. State, supra.*

**3.**

**Assuming the objection of disqualification existed in fact and has not been waived, the subsequent hearing on the merits by a disinterested Court under Section 11514 has cured any such supposed defect and satisfied every requirement of due process of law.**

We have already seen that Section 11514 provides for a full, free and untrammeled review and examination of the *legality* of the commitment or attachment without prejudice by reason of any action, finding or conclusion of the committing magistrate. (See pp. 7 and 8, *supra.*) The statute provides for a full, free examination by an unprejudiced and qualified court. In *Tumey v. State,* 273 U. S. 510, the defendant had no opportunity for a fair trial on the merits either in the court of original jurisdiction or in any reviewing court. The judgment of the disqualified magistrate could not be set aside so long as there was any evidence to support it. *Tumey v. State, supra,* page 533. Here the witnesses were entitled to apply to any court of record of the State for a determination of the *legality* of the action holding them respectively to answer the questions and testify in the cause. This review was free and untrammeled. It was not prejudiced, restricted, limited or affected by any action, finding or conclusion theretofore made by the supposedly disqualified officer. It was a full, free review by a competent, unprejudiced and qualified court. Under these

circumstances, it is clear that there is no denial of due process of law. In *Ex parte Meeks*, 20 Fed. (2d) 543, (District Court, Kentucky, 1927) the syllabus reads:

> "Question involved in habeas corpus proceeding to release a person from confinement under a judgment of a state court convicting him of a crime is whether he has been denied due process of law, under Const. U. S. Amend. 14, by the state, and that is determined, not merely by the result in one state judicial tribunal, but by the whole procedure open to him under the state law, and whether state law furnishes means by which the wrong done in one tribunal may be corrected in another.
>
> That under Kentucky law county judge, who tried case in which petitioner was convicted of illegal transportation of intoxicating liquor, in violation of state prohibition enforcement act, was entitled to 10 per cent. of fine imposed, *held* not to entitle petitioner to habeas corpus writ out of federal court, on the ground that trial judge's pecuniary interest denied petitioner the equal protection of law and due process of law, guaranteed by Const. U. S. Amend. 14, where he failed to avail himself of right under Cr. Code Prac. Ky., §§ 362, 366, to appeal to state circuit court, in which trial *de novo* would have been had, with further right of appeal to Court of Appeals, and possible application for writ of prohibition under section 25."

The *Tumey* case is distinguished on the same ground in the following cases, all holding that a subsequent trial on the merits by a disinterested court cures the defect and grants to the defendant "due process of law." *Hitt v. State*, 149 Miss. 718, 115 So. 879; *Hill v. State*, 174 Ark. 886, 298 S. W. 321; *Ex Parte Lewis*, 288 Pac. 354 (Okla. Crim. App. 1930), and *Brooks v. Town of Potomac*, 149 Va. 427, 141 S. E. 249. See also *Frank v. Mangum*, 237 U. S. 309, 327, 331.

## C.

### The Contention that the Duces Tecum Clauses of the Subpoenas Served on Bevan and Koehrman Constitute Unreasonable Searches and Seizures, Presents No Federal Question, But, Were the Law Otherwise, It Is Manifest Both that Such Duces Tecum Clauses Were Valid and that Invalidity of Such Duces Tecum Clauses, Either in Whole or in Part, Would Constitute No Excuse for the Disobedience of Said Appellants.

We are at a loss to understand the reasoning underlying the appellants' argument that a Federal question under the Fourteenth Amendment can be raised by the assertion that a subpoena *duces tecum* served in a proceeding in the State Court is unreasonable and too broad and sweeping in its scope. If they contend that the subpoenas served upon Bevan and Koehrman constituted unreasonable searches and seizures and that the privileges and immunities granted by the Fourteenth Amendment include protection against unreasonable searches and seizures, their argument is clearly untenable in the face of the prior decisions of this Court. The personal rights, privileges and immunities set forth in the first eight amendments of the Federal Constitution, including the safeguard against unreasonable searches and seizures provided in the Fourth Amendment, are not within the "privileges and immunities" covered by the Fourteenth Amendment. *Twining v. New Jersey*, 211 U. S. 78. And therefore an unreasonable search and seizure may be made by a state officer under state authority without violating the Federal Constitution in this respect. *Weeks v. United States*, 232 U. S. 383, 398.

If, on the other hand, the appellants contend that the due process clause of the Fourteenth Amendment, without reference to the first eight amendments, protects against unreasonable subpoenas *duces tecum*, their argument is

likewise untenable. There is nothing in the Fourteenth Amendment which prohibits a State from compelling the production of documentary evidence, no matter how broad in scope or how unreasonable such compulsion may be as a matter of fact. The most that due process of law could require would be that the compulsion be according to legal procedure with due notice and an opportunity for hearing. Thus it is stated in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 at 551:

> "So long as a hearing is given before any proceeding is concluded to enforce production of the papers, due process of law is afforded."

The complaint of the appellants on this score must therefore be limited to the identical claims raised in connection with the subpoenas and orders directing them to appear and testify, which claims we have already fully discussed and shown to be without merit (*supra*, pp. 14-20, 50-53). The further suggestion that this Court should examine the subpoenas *duces tecum* and pass upon the reasonableness of their scope or the materiality of the evidence demanded is as unsound as a claim that this Court should pass upon the relevancy of the questions asked the witness, Bevan, or any other questions of purely state law.

However, if it be assumed for the sake of argument that the reasonableness or unreasonableness of the subpoenas *duces tecum* presents a Federal question under the Fourteenth Amendment, it is manifest that the subpoenas are regular in every respect and are not too broad or sweeping. The claim of invalidity cannot be based upon the ground that the records and documents called for are insufficiently described. It is not necessary to designate each particular paper (*Consolidated Rendering Co. v. Vermont, supra*, at 551); but so long as the papers or records are specified with such certainty that the witness may know what documents and papers are wanted, the descrip-

tion is sufficient. *United States v. Babcock,* 3 Dill. 556, Federal Cases No. 14,484. It is also well settled that so long as there is any reasonable ground to believe that the documentary evidence called for by the subpoena may be relevant or material, the subpoena is not open to attack on the ground of unreasonableness. *Hale v. Henkel,* 201 U. S. 43, 73; *Consolidated Rendering Co. v. Vermont,* 207 U. S. 541; *United States v. Terminal Ry. Assn.,* 148 Fed. 486, 489; *Eykelboom v. People,* 71 Colo. 318, 206 Pac. 388, 390; *In re Mohawk Overall Co.,* 210 N. Y. 474, 104 N. E. 925, writ of error dismissed 235 U. S. 685; *In re Consolidated Rendering Co.,* 80 Vt. 55, 66 Atl. 790.

A consideration of the broad scope and ramifications of the fraudulent conspiracy and fraudulent misrepresentations set forth in the petition in the Common Pleas Court establishes that the subpoenas *duces tecum* call for no documents, records or papers which are not relevant or pertinent to the allegations of the petition. It was so held by the Court of Appeals of Lucas County. It was so held by the Supreme Court of Ohio. The same view was expressed by Judge Hough in the hearings in the Federal District Court. (Opinion unreported.) The petition in the Common Pleas Court charges a fraudulent conspiracy initiated at least as early as 1917. It charges the acquisition of the stock of the Sielcken Estate by the individual defendants through widespread, fraudulent misrepresentations and concealments for a grossly inadequate price. It seeks to recover the stock and all cash or stock dividends declared and paid since the fraudulent conversion. (Bevan, 70-88; Koehrman, 48-66.) Obviously proof of these allegations requires evidence of the financial condition and affairs of The Woolson Spice Company. It involves a tracing of the stock fraudulently converted and the cash and stock dividends paid thereon. The petition charges that some of these defendants occupied a position of confidence which

imposed upon them a trust. Without burdening the Court further with details as to the broad, fraudulent conspiracy and widespread fraudulent misrepresentations charged against the defendants, which can only be fully appreciated by an examination of the petition, it is clear that the subpoenas *duces tecum* called for documents relevant and material to the allegations of the petition.

Clearly the documents described in the subpoenas *duces tecum* tend to support the allegations of the petition. In the words of Mr. Justice McKenna in *Nelson v. United States,* 201 U. S. 92, at 114:

> "* * * they are elements in the proof, having tendency enough to sustain the charge to be considered material."

However, an examination of the subpoenas served upon the appellants Koehrman and Bevan, will disclose that they consist of two parts, one a command to appear and give evidence as a witness, and the other a command to produce certain described papers and records. (Bevan, 44-46; Koehrman, 43-44.) It is well settled that the invalidity of a *duces tecum* clause of such a subpoena does not excuse a failure or refusal to comply with the *ad testificandum* clause. *Leber v. United States,* 170 Fed. 881; *Wilson v. United States,* 221 U. S. 361, 373-4; *United States v. Terminal Ry. Ass'n of St. Louis,* 148 Fed. 486, 488-9; 40 *Cyc.* 2169-70. The foregoing cases also establish that if, as respondent believes not to be the fact, any section of the *duces tecum* clauses of the subpoenas is too broad or otherwise invalid, that did not excuse Bevan and Koehrman from complying with the valid portions. The appellant Koehrman refused to appear and either testify under the *ad testificandum* clause, or produce any of the records subpoenaed. The appellant Bevan refused to testify under the *ad testificandum* clause, and refused to produce any of

the records subpoenaed. Hence both were in contempt even if it were assumed that the *duces tecum* clauses of their subpoenas were void in whole or in part. In *Hale v. Henkel, supra,* where the subpoena *duces tecum,* issued under Federal procedure, was found to be so sweeping and indefinite as to constitute an unreasonable search and seizure, the Court nevertheless remanded the petitioner to custody. The last paragraph of the syllabus reads:

> "Although the *subpoena duces tecum* may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this objection would not go to the validity of the order committing him for contempt."

Were any section of the *duces tecum* clause invalid or defective on any ground, as is not the fact, the remedy would be to move to quash the invalid sections, or, on appearance to refuse to produce the documents called for by such sections, while testifying generally and producing the papers lawfully required; but a witness can not contemptuously ignore the subpoena in reliance on a blanket or blunderbuss objection such as the one in the cases at bar, without suffering the penalties of contempt.

*Crocker-Wheeler Co. v. Bullock,* 134 Fed. 241, (cited in Appellants' Brief, p. 61), merely involved the question whether a witness could be required to produce privileged records containing trade secrets which were not relevant, and obviously has no application to the instant cases. There is no claim of privilege here.

Of course none of the claims of the appellants with respect to the subpoena *duces tecum* are available to appellant Stranahan who was served with an ordinary subpoena *ad testificandum.* (Stranahan, 43.)

## CONCLUSION.

In the foregoing brief we have examined each of the contentions of the appellants; and we have shown that such contentions, including those which cannot be raised on these appeals, are without merit. With the wisdom or policy of the Ohio statutes this Court is not concerned. However, the question here involved is not "only the right of a party to cross examine his adversary in connection with the assertion of private claims by private persons." (Appellants' Brief, 43.) It is the fundamental question whether the State of Ohio may compel its citizens to give testimony in aid of the administration of civil justice to the end that justice in the State may be certain and secure. The right to cross examine an adversary under Section 11497 is merely incidental to the more fundamental right to take testimony by deposition in civil causes and applies equally to the taking of testimony in open court. One purpose of the scheme for taking testimony by deposition in Ohio is to guard against and prevent the miscarriage of justice through loss of material or essential evidence. The deposition cannot be used if the witness is available at the time of trial. Section 11525. Another purpose of the Ohio deposition statutes, which applies with peculiar force in these cases, is to provide a means whereby one, who is alleged to have wronged another and who has primary knowledge or controls primary evidence of the alleged wrong, may be compelled to disclose the truth to the end that complete, certain and even justice may be determined and administered. It is designed to prevent surprises, delays and miscarriages of justice.

The petition in the Common Pleas Court discloses a grievous wrong and charges a shocking fraud. It exhibits a far flung fraudulent conspiracy conceived, initiated and carried out by persons who had wrongfully gained control of the defendant corporation, who occupied and betrayed

a relation of the highest trust and confidence and who took advantage of the enforced absence of the rightful owner in a foreign land where he was, to the knowledge of the conspirators, being held by a fatal illness and as a United States citizen interned by the German Empire for the duration of the World War. The alleged instigators and participators in this fraud, who took advantage of the foregoing exigencies to work out and consummate their fraud in security and leisure during the enforced absence of Sielcken and, after his death, of his widow, include the appellants Stranahan and Koehrman and The Woolson Spice Company, of which the appellant Bevan is Secretary and Treasurer. Much of the material proof lies in the mouths and under the control of these defendants and appellants. Manifestly it is important to the administration of justice both that all competent evidence of the truth shall be disclosed and that such evidence shall not be lost by death or otherwise. The State of Ohio has deemed it essential to the effective and certain administration of justice that adequate provision should be made for the compulsion and preservation of such testimony. The appellants have sought and now seek to prevent the disclosure and the preservation of the truth by every technicality known to the law. The real question is merely whether these appellants shall be required to appear as witnesses and to tell the truth to the end that the truth may be established and preserved to make certain the administration of civil justice. As said by the late Mr. Chief Justice Taft, when Judge of a State Court in Ohio (*Shaw v. Ohio Edison Co.*, 9 Ohio Dec. Reprint 809, 812):

> "What a witness is presumed to know is the truth and that cannot vary between the time of taking the deposition and the trial. If there is likely to be a variance in the testimony, the earlier a witness is committed to a statement, the better for the sake of the truth."

Appellee respectfully submits that each of these appeals should be dismissed for lack of any substantial Federal question or that the judgments of the Supreme Court of Ohio in these cases should be severally affirmed.

Respectfully submitted,

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## APPENDIX A.

### Sections of the General Code of Ohio Involved, Cited or Discussed.

SEC. 127. *Fees of notaries public.*—A notary public shall be entitled to the following fees:

* * * * *

For taking and certifying acknowledgments of deeds, mortgages, liens, powers of attorney and other instruments of writing, and for taking and certifying depositions and affidavits, administering oaths and other official services, the same fees as are allowed by law to justices of the peace for like services. (R. S. §119.)

SEC. 1746-2. *Fees of justices for miscellaneous services.* For miscellaneous services, justices of the peace shall charge and collect from the persons for whom the services are rendered the following fees, and no more: * * * taking depositions and certifying to same, twenty-five cents per hundred words; * * *. (Eff. August 16, 1921.)

SEC. 2253. *Expenses of judges holding court outside county of residence.* In addition to the annual salary and expenses provided for in §§1529, 2251, 2252, 2252-1, each judge of the court of common pleas while holding court in a county in which he does not reside, by assignment of the chief justice under G. C. §1687, or without any assignment, shall receive his actual and necessary expenses incurred while so holding court in a county in which he does not reside, to be paid from the treasury of such county upon the warrant of the county auditor, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of G. C. §1469, to aid in disposing of business of some county other than that in which he resides, shall receive twenty dollars per day for each day of such assignment and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county. (Eff. Aug. 10, 1927.)

SEC. 2253-3. *Expenses of judges (of the) court of appeals holding court outside county of residence; pay when assigned to outside district.* In addition to the annual salary and expenses provided for in §§1529, 2251 and 2253-2, each judge of the court of appeals holding court in

a county in which he does not reside shall receive his actual and necessary expenses incurred while so holding court in a county in which he does not reside, to be paid by the state treasurer upon the warrant of the auditor of state issued to such judge; each judge of the court of appeals who is assigned by the chief justice by virtue of G. C. §1528, to aid in disposing of business of some district other than that in which he is elected or appointed, shall receive twenty dollars per day for each day of such assignment, to be paid from the treasury of the county to which he is so assigned and upon the warrant of the auditor of such county. (Eff. Aug. 10, 1927.)

SEC. 11497. *Corporations; officers may be examined.* At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony. (R. S. Sec. 5243.)

SEC. 11502. *Subpoena on taking depositions.* When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer. (R. S. Sec. 5248.)

SEC. 11503. *What subpoena to contain.* A subpoena shall be directed to a person named therein and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence. (R. S. Sec. 5247.)

SEC. 11504. *Service of subpoena.* A subpoena may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed. (R. S. Sec. 5246.)

SEC. 11510. *Contempt of court.* Disobedience of a subpoena, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a

witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required. (R. S. Sec. 5252.)

SEC. 11511. *When attachment may issue.* When a witness fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him. (R. S. Sec. 5253.)

SEC. 11512. *Punishment for contempt.* Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition. (R. S. Sec. 5254.)

SEC. 11514. *How witness released from imprisonment.* A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal. (R. S. Sec. 5255.)

SEC. 11521. *How testimony taken.* The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination. (R. S. Sec. 5261.)

SEC. 11525. *When deposition may be used.* The deposition of a witness may be used only when it is made to ap-

pear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of the witness is not required. (R. S. Secs. 5265, 5281.)

SEC. 11526. *What deposition taken.* Either party may commence taking testimony by deposition at any time after service upon the defendant. (R. S. Sec. 5266.)

SEC. 11529. *Officers authorized to take depositions.* Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission. (R. S. Sec. 5269.)

SEC. 11534. *Notice to take deposition.* Written notice of the intention to take a deposition shall be given to the adverse party, except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time when and place where it will be taken. In case the deposition of a party to the suit be taken, it shall not be used in his own behalf, unless the notice specified that his deposition would be taken. (R. S. Sec. 5273.)

SEC. 11535. *Service of Notice.* Such notice must be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent. The deposition shall only be used against such parties as are served with notice in one of the modes prescribed. It also must be served so as to allow the adverse party time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice. If so stated in the notice, the examination may be adjourned from day to day. (R. S. Sec. 5273.)

SEC. 11537. *By whom deposition written.* The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness. (R. S. Sec. 5275.)

SEC. 12165. *When writ not allowed.* If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate *had jurisdiction to issue the process,* render the judgment, *or make the order, the writ shall not be allowed*; or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order. (R. S. Sec. 5729.) (Italics ours.)

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# SUPREME COURT OF THE UNITED STATES.

Nos. 784, 785 and 786.—October Term, 1932.

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| 784 | C. N. Bevan, Appellant, *vs.* David M. Krieger, Sheriff. | Appeals from the Supreme Court of the State of Ohio. |
| 785 | John W. Koehrman, Appellant, *vs.* David M. Krieger, Sheriff. | |
| 786 | Robert A. Stranahan, Appellant, *vs.* David M. Krieger, Sheriff. | |

[May 22, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

The three judgments from which these separate appeals are prosecuted have a common origin, are founded upon the same Code provisions, in the main present related questions, and may be reviewed in a single opinion.

Suit was instituted in an Ohio court by Clara ~~Schwarz~~, as widow and sole legatee of Herman ~~Schwarz~~, against the Woolson Company (of which the appellant Bevan is secretary and treasurer), Koehrman, Stranahan, and others, to obtain redress for an alleged fraudulent scheme whereby her ~~husband~~ was induced to part with certain capital stock of that corporation. The plaintiff, desiring to take the depositions of the three appellants, proceeded as provided by the General Code of Ohio.[1] Subpoenas *duces tecum*

[1]Either party may commence taking testimony by deposition at any time after service of process (Sec. 11526), before a judge or clerk of a court, a justice of the peace, a notary public, and certain other designated persons (Sec. 11529). Notice of intention to take depositions must be given (Sections 11534-11535). The officer authorized to take the depositions may issue subpoenas, including subpoenas *duces tecum*, and provision is made for service upon the witness (Sections 11502-3-4). A party, or if the party be a corporation, any officer thereof, may be examined as if under cross examination (Sec. 11497).

Sidehan - Schwarz,

Sidehan,

deceased husband's executor,
The Columbia Trust Company,

were served upon Bevan and Koehrman, and a subpoena *ad testificandum* on Stranahan. A notary public was named to take the testimony, and at the time and place appointed Bevan appeared before him, was sworn, answered some questions, declined to answer others, and finally declared that he would answer no more. In each instance he was enjoined by the notary to answer, and in each case stated that he refused on the advice of counsel. He also failed to produce papers and documents called for in his subpoena, although he admitted that he had them in his possession or under his control, and in this matter also gave as his excuse advice of counsel. He did not claim personal privilege or possibility of self-incrimination, but he and his counsel contented themselves with the statement that the questions and the writings were immaterial and irrelevant to any issue in the suit. Koehrman and Stranahan failed to appear in response to the subpoenas served upon them. The notary, upon the plaintiff's request, issued a commitment of Bevan for contempt, and attachments for the other two appellants. These writs were delivered to the sheriff for service. All three appellants surrendered to that official, and applied to the Court of Appeals of Lucas County for writs of habeas corpus. After hearings, that court remanded each to the custody of the sheriff. The Supreme Court affirmed the judgments.

In the courts below, and here, the appellants have insisted that the statutes of Ohio authorizing their arrest and detention deprive them of due process. The sections of the General Code drawn in question are 11510, whereby disobedience of a subpoena and refusal to be sworn, or an unlawful refusal to answer as a witness, may be punished as a contempt of the officer by whom the attendance or testimony of the witness is required; 11511, which authorizes the notary to issue an attachment to arrest and bring before him the person subpoenaed to give his testimony or answer for his contempt; and section 11512 which fixes the penalty for contempt:

"When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition."

By Section 11514 it is provided that a witness so imprisoned by an officer may apply to a judge of the supreme court, court of ap-

peals, common pleas or probate court, who may discharge him if it appears that his imprisonment is illegal.

The appellants' position is that since the statute requires the witness to answer only lawful questions, and the notary, not being a judicial officer, is not permitted to pass upon the lawfulness of a question, but is bound to commit for refusal to answer, the commitment without a prior judicial hearing, and provision for such a hearing only after commitment (§ 11514), is a denial of due process.

Koehrman and Stranahan fail to present a federal question. Both of them, without excuse, absented themselves from the taking of the depositions. The writs of attachment issued to bring them before the notary for contempt were not served. While the sheriff held the process these appellants sought him out, surrendered to him, and immediately applied for writs of habeas corpus. Their conduct precludes the assertion that they were denied a hearing by the notary. They asked for none, and by their action rendered one impossible.

Bevan's case differs but slightly from those of Koehrman and Stranahan. He refused to answer questions or to produce the writings enumerated in his subpoena. The notary thereupon, after adjourning the hearing until the following day, issued the commitment. Bevan surrendered himself to the sheriff, and by habeas corpus challenged the legality of his detention.

In Ohio, as generally elsewhere, the officer taking a deposition does not rule upon the competency or materiality of the evidence to the issues made by the pleadings. The witness's testimony is taken subject to the reserved right to object to its admissibility at the trial. The right of objection and exclusion belongs to the parties, not to the witness. So far as disclosed, the refusal to answer and produce documents was based solely on the theory that the petition in the suit did not state a cause of action and that the depositions constituted a fishing expedition for evidence. But the appellant now insists that aside from their irrelevancy, which was the ground of refusal to answer, the questions propounded may have been improper as trenching upon the personal privilege of the witness, although he indicates no aspect in which this might be true. He says that it would have been useless for him to raise the issue before the notary because under the deci-

sions of the Ohio courts the latter is not a judicial officer invested with power to pass upon such an issue; that therefore a witness must take the risk that he is correct in his refusal to answer, and may vindicate his action only before a court after commitment, in accordance with section 11514.

In Ohio a notary has been held not to be a judicial officer within the meaning of the State constitution; but we think that he may nevertheless be authorized to pass upon the witness's privilege. We find no decision of the Supreme Court of Ohio holding the notary incompetent to consider and to pass in the first instance upon the propriety of a witness's refusal to answer. No such lack of power appears upon the face of the statutes. The appellant admits this, but asserts that the Code provision has been construed by the courts to prohibit the notary from passing on the witness's reasons for refusal to testify. We are not convinced that the State courts have so interpreted the statute.

But we deem it unnecessary to pursue the inquiry, or to express any view as to the adequacy of the hearing afforded after commitment by section 11514, for the reason that the alleged deprivation of appellant's liberty was consequent upon his sweeping statement that he would answer no further questions. Such conduct by a witness in any court would be sufficient ground for his commitment without further or other hearing. Such an attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt. Bevan requested no consideration of his rights by the notary, and was denied no hearing by that officer upon the issue whether the questions infringed his personal privileges as a witness. His claim that he was denied due process is therefore without foundation.

The appellant Bevan also advances the contention that the notary had such a pecuniary interest in compelling the testimony as would disqualify him, and deprive his rulings of the impartiality required for due process. Notaries are entitled to fees of twenty-five cents per hundred words for taking and certifying depositions (General Code, §§ 127, 1746-2). These are paid in the first instance by the party taking the depositions, and are taxable as costs in the suit. It appears from the record that it is also customary for the notary if, as in this case, he happens to be a stenographer, to take the testimony stenographically and to

furnish additional copies to the parties at a charge somewhat less per hundred words than is provided in the statute. These facts are said to bring the case within the principle announced in *Tumey* v. *Ohio*, 273 U. S. 510. But we think the suggested analogy does not exist. Tumey, as mayor of a city, sat as a magistrate. His judgments were final as to certain offenses, unless wholly unsupported by evidence. The law awarded him a substantial fee if he found an offender guilty, and none in case of acquittal. Tumey's interest was direct and obvious, but the possibility that the extent of the notary's services and the amount of his compensation may be affected by his ruling is too remote and incidental to vitiate his official action. Moreover, his action lacks the finality which attached to the judgment in the *Tumey* case, as it is subject to review in accordance with section 11514.

*No. 784, judgment affirmed.*
*Nos. 785 and 786, appeals dismissed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*